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In the Supreme Court of the United States

October Term, 1981

COMMONWEALTH OF PENNSYLVANIA, et al.,
Petitioners

v.

DOROTHY HOOTS, individually and as a mother of her children, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATEMENT OF THE QUESTIONS PRESENTED

1. In a school desegregation case can a finding of discriminatory intent be based solely on the foreseeability of the disparate impact of a school district reorganization and the discriminatory motives of non-parties?

2. In a school desegregation case can school districts be included in an interdistrict remedy without having been provided an opportunity to prove their own lack of involvement in any unconstitutional conduct?

TABLE OF PARTIES

DOROTHY HOOTS, individually and as mother of her children, JANELLE HOOTS and JAMIE HOOTS; MRS. ADDRALLACE KNIGHT, individually and as mother and natural guardian of her children, RONALD KNIGHT, LORETTA KNIGHT, TERRANCE KNIGHT, MARC KNIGHT and BYRON KNIGHT; BARBARA SMITH, individually and as mother and natural guardian of her children, TAWANDA SMITH, TEVELA SMITH, JOSEPH SMITH, WESLEY SMITH and ERIC SMITH; on behalf of themselves and all others similarly situated; Mae Helen Woody, Juanita Jordan

Plaintiffs

v.

COMMONWEALTH OF PENNSYLVANIA; EDWARD X. HALLENBERG, President of the Allegheny County Board of School Directors; THE ALLEGHENY COUNTY BOARD OF SCHOOL DIRECTORS; W. DEMING LEWIS, Chairman of the PENNSYLVANIA STATE BOARD OF EDUCATION; MICHAEL SULLIVAN, President of the School District of the Borough of Braddock, THE SCHOOL DISTRICT OF THE BOROUGH OF BRADDOCK; ANDREW LISYAK, President of the School Board of the School District of the Borough of Rankin; THE SCHOOL DISTRICT OF THE BOROUGH OF RANKIN, LEO CAMPBELL, President of the School Board of the School District of the Borough of North Braddock; and THE SCHOOL DISTRICT OF THE BOR-

OUGH OF NORTH BRADDOCK; THE ALLEGHENY INTERMEDIATE UNIT BOARD OF THE SCHOOL DIRECTORS and EDWARD X. HALLENBERG AS PRESIDENT OF THE ALLEGHENY INTERMEDIATE BOARD OF SCHOOL DIRECTORS

and

CHURCHILL AREA SCHOOL DISTRICT;
EDGEWOOD SCHOOL DISTRICT;
SWISSVALE AREA SCHOOL DISTRICT;
TURTLE CREEK AREA SCHOOL DISTRICT

Defendants

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Commonwealth of Pennsylvania and W. Deming Lewis, Chairman of the State Board of Education, hereby petition that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on February 1, 1982.

I. OPINIONS OF THE COURTS BELOW

The opinion of the Court of Appeals of which petitioners seek review is reproduced at 86a to 122a and is not yet officially reported.

The opinion and order of the district court is reproduced at 69a to 85a, but is not reported.

II. JURISDICTION

The judgment of the Court of Appeals was entered on February 1, 1982. The jurisdiction of this Court is involved pursuant to 28 U.S.C. §1254.

III. CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment—United States Constitution Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny for any person within its jurisdiction the equal protection of the laws.

IV. STATEMENT OF THE CASE

This action was commenced on June 9, 1971, when plaintiffs[1] filed a complaint alleging that the consolidation of various school districts in Allegheny County by the Commonwealth of Pennsylvania, acting through the State and County Boards of Education[2], had resulted in the creation of racially segregated schools. Following trial, in 1973, the district court held that the creation of the General Braddock Area School District by the State and County Boards was an act of discrimination in violation of the Fourteenth Amendment. *Hoots v. Commonwealth of Pennsylvania*, 359 F.Supp. 807 (M.D. Pa. 1973) (*"Hoots II"*)[3] (37a).

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[1] The plaintiff class consists of parents of children who attend public schools in the General Braddock Area School District in Allegheny County, Pennsylvania.

[2] Defendants are the Commonwealth of Pennsylvania, the Pennsylvania State Board of Education (the "State Board"), the Allegheny Board of Education (the "County Board", later succeeded by the "Intermediate Unit"), and several of the Boards' officers.

[3] There are ten other decisions in this case: *Hoots v. Commonwealth of Pennsylvania*, 334 F.Supp. 820 (W.D. Pa. 1971) (*"Hoots I"*); *Hoots v. Commonwealth of Pennsylvania*, 495 F.2d 1095 (3d Cir.), *cert. denied*, 419 U.S. 884 (1974) (*"Hoots III"*); *Hoots v. Commonwealth of Pennsylvania*, 587 F.2d 1340 (3d Cir. 1978) (*"Hoots IV"*); *Hoots v. Commonwealth of Pennsylvania*, 639 F.2d 972 (3d Cir. 1981) (*"Hoots V"*); *Hoots v. Commonwealth of Pennsylvania*, 510 F.Supp. 615 (W.D. Pa. 1981) (*"Hoots VI"*); *Hoots v. Commonwealth of Pennsylvania*, (W.D. Pa., 71-538, April 6, 1981) (*"Hoots VII"*); *Hoots v. Common-*

Over the next seven and a half years various plans were considered by the district court as possible remedies. Finally, in April of 1981, the district court approved the desegregation plan requiring the consolidation of five school districts into one. These appeals followed.

This case arises from three similar pieces of legislation enacted during the 1960's providing for the reorganization of school districts in Pennsylvania's public school system. The Act of September 12, 1961, P.L. 1283, No. 561, 24 P.S. §281 *et seq.* ("Act 561"), directed each county board of school directors to prepare a plan of organization of school districts for the county for review by the State Board of Education. This Act was superseded by the Act of August 8, 1963, P.L. 564, No. 299. 24 P.S. §2-290 *et seq.* ("Act 299"), which was subsequently superseded by the Act of July 8, 1968, P.L. 299, No. 150, 24 P.S. §2400.1 *et seq.* ("Act 150"). Act 299 instructed the county boards to prepare on or before July 1, 1964 a plan of organization of school districts for the county and directed the State Board of Education to review organization plans prepared by the county boards and to approve such plans as it deemed wise and in the best interest of the educational system of Pennsylvania. Act 150 renewed that

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wealth of Pennsylvania, (W.D. Pa. 71-538, April 28, 1981) (*"Hoots VIII"*); *Hoots v. Commonwealth of Pennsylvania*, Nos. 81-1691-95, 81-1790, 81-1986-88 (3d Cir. February 1, 1982). (*"Hoots IX"*); *Hoots v. Commonwealth of Pennsylvania*, Nos. 81-2298, 81-2787-88 (3d Cir. February 1, 1982) (*"Hoots X"*); *Hoots v. Commonwealth of Pennsylvania*, No. 81-2732 (3d Cir., February 1, 1982) (*"Hoots XI"*).

In addition, the Court of Appeals denied plaintiffs' applications for writ of mandamus on two occasions. *Hoots v. Weber*, No. 79-1474 (3d Cir. May 2, 1979); *Hoots v. Weber*, 80-2124 (3d Cir. Sept. 9, 1980).

requirement, providing for final establishment of consolidated school districts by July 1, 1968.

Churchill School District was created by voluntary merger in 1966, pursuant to Act 299.[4] Thereafter, in 1968-69, the State and County Boards approved the creation of Turtle Creek, Swissvale, Edgewood and General Braddock School Districts.[5] Those districts all lie in the central eastern area of Allegheny County, east of Pittsburgh and north of the Monongahela River. Turtle Creek, Swissvale, and Churchill all border on General Braddock, and Edgewood is situated within approximately one mile of the General Braddock. The final racial effect of these reorganizations was to create or maintain four predominately white districts and one predominately black district (63% black)—General Braddock. *Hoots II*, 359 F.Supp. at 819 (28a-30a).

Plaintiffs filed this action on June 9, 1971. In December 1971, the district court denied defendants' motion to dismiss, rejecting the Commonwealth's arguments and that the complaint failed to state a cause of action and that plaintiffs had failed to join indispensable parties—the school districts surrounding General Braddock. *Hoots I*, 334 F.Supp. 820 (1a-5a).

Prior to trial, the Commonwealth defendants again moved for joinder, as party defendants, of Churchill, Edgewood, General Braddock, Swissvale and Turtle Creek on

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[4] Because of that merger under Act 299 Churchill was exempt from involuntary merger under Act 150, 24 P.S. §2400.2

[5] The creation of Swissvale and Edgewood was not finalized until 1971 when the Supreme Court affirmed the State Board's decision not to join those two districts together. *Edgewood Borough School District Appeal*, 445 Pa. 343, 285 A.2d 880 (1971).

the grounds that these parties were necessary to the grant of any realistic relief, should liability be found. The district court again rejected that motion, but stated that it would permit the school districts to intervene voluntarily in the action if they so desired. *Hoots I*, 334 F.Supp. at 823 (5a). The school districts did not do so.

On May 15, 1973, the district court held that the State and County Boards' creation of the identifiably black General Braddock School District constituted an act of discrimination in violation of the Fourteenth Amendment. *Hoots II*, 359 F.Supp. at 823 (37a). The court ordered the defendants to submit a desegregation plan which "shall alter the boundary lines of the General Braddock Area School District and as appropriate of adjacent and/or nearby school districts." *Id.* at 824 (40a). Defendants did not appeal at that time.

In April 1974, after issuance of that order, Churchill, Edgewood, Swissvale and Turtle Creek petitioned to intervene. The district court granted these petitions insofar as they sought prospective intervention, but denied them insofar as they sought retroactive intervention. Churchill and Turtle Creek appealed. The Court of Appeals affirmed the district court, holding that the retroactive intervention petitions were untimely. *See Hoots III*, 495 F.2d 1095, 1097 (3d Cir.), *cert. denied*, 419 U.S. 884 (1974). The Court of Appeals expressly declined to decide whether the school districts were indispensable parties under Rule 19 of the Federal Rules of Civil Procedure, holding that the school districts had no standing to raise that issue. *Id.* at 1096 n.3 (44a-45a).

In the next seven years, the district court rejected four plans submitted by the Commonwealth and the de-

fendant districts.[6] Pursuant to the district court's orders, three of the plans were interdistrict in nature, and two of those involved the consolidation of some or all of the school districts presently involved in this case into one or more new school districts.

Plaintiffs appealed twice during the 1973-1980 period. On both occasions they asked the Court of Appeals for orders directly requiring the merger of shool districts in central eastern Allegheny County. Plaintiffs' first appeal was dismissed in 1978. *Hoots IV*, 587 F.2d at 1351 (93a). The second appeal was taken, in August of 1980, from an order denying a motion, made in the middle of hearings on a desegregation plan, to grant plaintiffs' motion to reject the plan submitted and order submission of a new plan. Plaintiffs appealed again.

On January 26, 1981, the Court of Appeals ordered:

> the district court to expedite its consideration of this case so that within ninety days of the issuance of the mandate of this court it shall:

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[6] The first plan was submitted in the fall of 1973 and rejected in May of 1975. The second plan was submitted by the Commonwealth in September of 1975. That plan was rejected by order dated November 17, 1977.

In its order rejecting the 1975 plan, the District Court did not order submission of a new plan. Submission of such a plan was not ordered until May of 1979.

Pursuant to that order, the Commonwealth submitted a "tuition plan" in September of 1979. An expanded version of that plan was filed in May of 1980. Thereafter, in June of 1980, General Braddock filed an intradistrict plan, providing for the upgrading of its educational programs. Both the tuition plan and upgrading plan were rejected by the district court on April 6, 1981.

1) complete all hearings and necessary proceedings on the merits of the competing remedial plans for the desegregation of GBASD;

2) decide the *Milliken v. Bradley* issue of which school districts may be included within an interdistrict remedy; and

3) enter an appropriate final order granting appellants the relief to which they are entitled under the district court's order of May 15, 1973, such relief to be effective and implemented by the beginning of the first semester of the school year in the fall of 1981.

Hoots V, 639 F.2d at 980-81 (footnotes omitted) (93a-94a).

Pursuant to that order, on March 5, 1981, the district court entered an opinion and order concluding that a multi-district remedy involving some or all of those districts was appropriate. *Hoots VI*, 510 F.Supp. at 619 (55a). On April 6, 1981, the district court rejected two remedial plans filed by defendants—the Upgrade Plan and the Tuition Plan. *Hoots VII* (94a). The court concluded that only an interdistrict remedy was feasible, and that a single new district should be formed by consolidation of General Braddock with some of the surrounding districts. *Hoots VII* at 3 (94a-95a).

On April 28, 1981, after further hearings, the district court entered its remedial order combining General Braddock, Churchill, Edgewood, Swissvale and Turtle Creek to create one school district, now known as the Woodland Hills School District. The court also created an interim operating committee to operate the new school

district and ordered that committee and the relevant state and county officials to design a desegragation plan for implementation in the 1981-82 school year.

After further hearings, the district court entered two orders on July 23 and August 13, 1981, setting forth the details of a desegregation plan. That was implemented for grades 7-12 on September 8, 1981. The district court is presently considering a plan for the desegregation of grades 1-6 and kindergarten.

Meanwhile, each of the defendants, except General Braddock, filed appeals from the district court's order of April 28, 1981 ordering the merger of the five school districts. On February 1, 1982, a panel of the Third Circuit affirmed the district court judgments. *Hoots IX*. Specifically, it found the district court had, over the years, made findings of discriminatory intent and that those findings were supported by the evidence. The court also agreed with the district court that an interdistrict remedy was appropriate and that each of the appellant school districts could properly be joined in that remedy. Finally, in a footnote, the court dismissed, without discussion, contentions that the affected school districts should have been joined as party defendants prior to the trial and that, in any case, those districts should have been permitted to present evidence on the existence of illegal discrimination and their lack of involvement in any discrimination which took place (114a).

It is from this decision that defendants Commonwealth of Pennsylvania and W. Deming Lewis, Chairman of the Pennsylvania State Board of Education, hereinafter referred to as petitioners, seek a writ of certiorari.

REASONS FOR GRANTING THE WRIT

A. The Decision of the Lower Court Conflicts With Controlling Decisions of This Court

1. The lower court improperly made its own finding of segregative intent based on inappropriate inferences.

It can no longer be disputed that the Constitution prohibits only *de jure* segregation, not *de facto* segregation, and that the difference between prohibited segregation and *de facto* segregation is purpose or intent to segregate. *Keyes v. School District No. 1,* 413 U.S. 189, 208 (1973); *Husbands v. Commonwealth,* 395 F. Supp. 1107, 1132 (E.D. Pa. 1975). See *City of Memphis v. Greene,* 451 U.S. 100, 101 S.Ct. 1584 (1981); *Arlington Heights v. Metropolitan Housing Corp.,* 429 U.S. 252, 265 (1977); *Washington v. Davis,* 426 U.S. 229, 238 (1976).

Moreover, it is well established that the requisite intent is not demonstrated by the foreseeability of segregative impact. To the contrary, as this Court has stated:

> 'Discriminatory purpose', however implies *more than* intent as violation or *intent as awareness of consequences.* (Citations omitted). It implies that the decision maker, in this case a state legislator, selected or reaffirmed a particular course of action at least in part 'because', not merely 'in spite of', its adverse effects upon an identifiable group.

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979) (emphasis added).

In this case, the district court made no finding of purposeful, intentional discrimination by any defendant. To the contrary, this case was pleaded, tried and decided on the erroneous theory that action having a segregative impact or effect is unconstitutional regardless of intent.

This is because neither the judge nor the parties understood discriminatory intent to be relevant prior to this Court's decision in *Keyes*—a decision issued after the trial and liability decision in this case. Indeed, at trial, the trial judge essentially disclaimed any interest in testimony on motive, stating:

> Well, I don't know if we are interested or not in motive or anything like that, but is the end result such that this [segregation] was achieved.

(N.T. 12/6/72 at 247). This disinterest is certainly less than surprising in light of plaintiffs' failure to allege discriminatory intent and stipulations by the parties that the State and County Boards did not consider race in preparing and approving school reorganization plans under Act 150.

Nonetheless, the Court of Appeals found district court findings which it interpreted as establishing segregative intent. The appellate court based that finding on a rather selective reading of the various opinions issued by the district court over the nine year history of this litigation.[7]

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[7] The court found further support for its interpretations of the district court findings in comments made by the district court judge at some of the many hearings held over the eight year history of this case. Even assuming that kind of "judicial history" is relevant, the lower court's use of that history was so selective

Moreover, it affirmed the purported findings of the district court on the theory that the segregative impact of their actions should have been clear to defendants and that that foreseeability is sufficient proof of their discriminatory intent. The Court also relied on evidence that third parties, not defendants to this action, had improper motives and may have communicated those desires to defendants.

As is demonstrated above, the lower court's theory that the foreseeability of segregative impact is sufficient to support a finding of unlawful discrimination is simply wrong and is in direct conflict with the holdings of this Court. *Personnel Administrator of Massachusetts v. Feeney, supra.* Likewise, the motives of non-party (and often unidentified) individuals is irrelevant to the issue of defendants' segregative intent. Rather, it is only the actions and intent of defendants, not third parties, which are relevant on that point. *City of Memphis v. Green,* 451 U.S. 114, n. 23 (1981).

In truth, this is a case in which defendants acted "in spite of" the segregative impact they knew their actions would cause. There was substantial evidence that defendants believed they were required to be color-blind. While that belief may not have been correct or even justified, there was no evidence that it was pretextual or that it was

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as to be incredible. Indeed, for every instance that the district court judge claimed to have found discriminatory intent, there is probably a corresponding comment elsewhere in the record disclaiming such a finding. For example, at one point, in an order requiring submission of a plan, the district court explicitly characterized the discrimination it had found as *de facto.* The Court of Appeals, of course, ignored that and other similar parts of the record in evaluating the "judicial history" of this case.

not the basis, in fact, for defendants' action. The lower court's attempt to support such a conclusion by inference flies directly in the face of this Court's holdings. See *Personnel Administrator of Massachusetts v. Feeney, supra; City of Memphis v. Greene, supra.* Accordingly, the holding in this case should be reviewed and, upon review, reversed by this Court.

B. The Lower Courts' Refusal To Join the Surrounding School Districts and Allow Them To Present Evidence on Their Non-Involvement in Any Constitutional Violation Presents an Issue of Public Importance

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The Commonwealth defendants filed a motion to join Edgewood, Churchill, Swissvale and Turtle Creek as necessary parties prior to the start of the trial in 1972. That motion was denied. The Commonwealth renewed its motion at trial and the court again denied it both before and after completion of the trial, basing its ruling on the following analysis:

> The absence of the surrounding school districts does not affect the complete relief available to existing parties. The power to draw school district boundaries rests solely with the Commonwealth of Pennsylvania and the Pennsylvania State Board of Education. Local school districts have no power or control over their own boundaries. They can be altered at any time by the Commonwealth. The surrounding school districts have no legal right to have their existing boundaries maintained and consequently they have no legal interest under the provisions of Fed. R.

> Civ. P. 19 which can be affected by the outcome of this litigation.

Hoots II, 359 F.Supp. at 821 (33a).

Unfortunately, as the district court eventually recognized, that analysis was wrong. As of July 1, 1969, the Commonwealth defendants were without power to accomplish a reorganization of the appellant school districts. On that date, the power of the State Board to accomplish a reorganization under Act 150 expired. 24 P.S. §2400 *et seq.* See *Hazelton Area School District v. State Board of Education*, 21 Pa. Commonwealth Ct. 547, 374 A.2d 347 (1975), *aff'd* 468 Pa. 564, 364 A.2d 660 (1976). Accordingly, any remedy involving the merger of school districts required that the affected school districts be ordered directly, by the court to merge. The district court apparently realized its error in May of 1979 when it joined the school districts as defendants. Its subsequent orders concerning merger were directed against the school districts.

Rule 19(a) provides for joinder if feasible of those persons whose presence is necessary to grant full relief, who have an interest in the subject matter of the litigation and whose ability to protect that interest may be impaired or impeded by a disposition in his absence. As is noted above, the School Districts were certainly necessary to grant full relief. They also had an interest in this litigation in that their administrative units and boundaries were going to be invalidated. Finally, their ability to protect that interest was substantially impaired by the lower court's decision, in their absence, that a constitutional violation had occurred and that they had been involved in causing that violation.

In this regard, the State and County defendants made clear to the lower court from the beginning their unwillingness to represent the interests of the appellant school districts. Yet, in finding facts justifying the inclusion of those school districts in an interdistrict remedy, the district court relied solely on the record created at trial by plaintiffs and the defendant Boards.

Specifically, in its opinion of March 5, 1981, the district court discussed at length the events leading up to the creation of General Braddock School District, concluding for the first time, that the illegal acts had involved each of the appellant school districts. For example, the court found that some of the "surrounding school districts" were not "innocent" in the reorganization plan which created General Braddock.[8] *Hoots* VI, 510 F. Supp. at 620 (59a). In addition, the district court excluded two school districts, West Mifflin and Steel Valley, from the remedy on the factual grounds, *inter alia*, that "[t]hey were never considered in prior merger plans" and "neither Steel Valley nor West Mifflin were involved in the jointure, consolidation or merger of the school districts which eventually led to the creation of the General Braddock School District." *Id.* at 622 (62a-63a).

Neither defendants had any interest, at trial, or in March of 1981, in establishing the "innocence" of the school districts surrounding General Braddock or the degree of their involvement in the creation of General Braddock. Only the school districts were in a position to dispute their involvement in any Fourteenth Amendment

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[8] This conclusion was based on its finding, after trial, that some unnamed school districts attempted to avoid merger with Braddock and Rankin. *Id.* at 619 (59a).

violation. Thus, those complex issues were decided without any real adversarial proceedings, and even assuming, *arguendo*, that the record below supports imposition of an interdistrict remedy,[9] the lower court erred in ordering such a remedy against the school districts without first providing them a hearing concerning the nature and extent of their involvement in a constitutional violation.

In *Milliken v. Bradley*, 418 U.S. 717 (1974), this Court held that absent an interdistrict violation there can be no interdistrict remedy. *Id.* at 745. This rationale would indicate that for the district court to find such interdistrict violation, the school districts involved would have to be parties. In *Milliken I* the Court did not reach that issue, however it served clear warning that school districts, in order to be included in the interdistrict remedy should be joined at the liability stage. This case presents the next step beyond that ruling and, accordingly, presents an issue of importance suitable for review by this Court.

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[9] The school districts argued below that the district court failed to make findings necessary to support an interdistrict remedy and that, in any case, the record would not support such findings. The Commonwealth defendants have taken no position on that issue.

VI. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Third Circuit in this case.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DOROTHY HOOTS, individually and as mother of her children Janelle Hoots and Jamie Hoots, et al., Plaintiffs.

v.

COMMONWEALTH OF PENNSYLVANIA et al., Defendants.

Civ. A. No. 71-533

Dec. 8, 1971

[334 F. Supp. 820 (1971)]

OPINION

WEBER, District Judge.

Plaintiffs' Complaint contains allegations that:

(a) In preparing and adopting the school reorganization plans defendants intentionally and knowingly created racially segregated school districts.

(b) In preparing and adopting the school reorganization plan the defendants failed to take steps to eliminate racial imbalance.

(c) In preparing and adopting the school reorganization plans the defendants failed to consider and make findings with respect to the racial characteristics of the new districts which they were creating.

(d) In preparing and adopting the school reorganization plan the defendants compelled the formation of an economically deprived school district which does not have the resources to provide education opportunities commensurate with the adjoining school districts and thus deprives plaintiffs of equal educational opportunities.

All defendants filed motions to dismiss but that of the Commonwealth of Pennsylvania has been withdrawn.

The remaining defendants allege in support of their motions:

1. The Complaint fails to state a cause of action.

We have no doubt that the allegations of deliberate creation of a racially segregated school district state a cause of action, and that the remaining allegations are ancillary and supportive of this claim. Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L. Ed. 873 [1954]; Taylor v. Board of Education of City School District of New Rochelle, 294 F.2d 36 [2nd Cir., 1961]; Brewer v. School Board of City of Norfolk, 397 F.2d 37 [4th Cir., 1968].

While defendants argue that plaintiffs' complaint does not contain a short simple statement of the cause of action, we do not believe that it is subject to dismissal because it pleads so much material that is evidentiary.

2. The corporate parties defendant, being political subdivisions of the Commonwealth are not "persons" subject to suit under the Civil Rights Act and are not proper parties defendant.

While the right to maintain suit for monetary damages against municipal corporations or political subdivisions has been denied under the Civil Rights Acts this denial has been limited to relief for monetary damages and has not been applied where the relief sought is injunctive in nature. See: Service Employees International Union A.F.L.-C.I.O. v. County of Butler, 306 F. Supp. 1080 [W.D. Pa., 1969].

Moreover, this complaint avers that the suit is brought for injunctive relief to redress a deprivation of a right granted by the Fourteenth Amendment to the Constitution of the United States. As was recently stated by the Court of Appeals for this circuit:

> "While the Civil Rights law is rightfully stressed in the complaint, violation of the Fifth, Sixth and especially the Fourteenth Amendments are firmly a part of plaintiffs' cause and are never discarded. The language of the complaint could have perhaps been sharper in spots but that is no dispositive Federal practice error. As it stands the complaint makes the clear charge that John Scher was not accorded due process under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution." (p. 744). Scher v. Board of Education of Town of West Orange, 424 F.2d 741 [3rd Cir., 1970].

As cited in the above opinion:

> "'A case brought under the Civil Rights Act should not be dismissed at the pleading stage unless

it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim.' Holmes v. N. Y. C. Housing Authority, 2 Cir., 398 F.2d 262, 265."

Broadly stated, we have a case arising under the Constitution of the United States, over which the United States District Courts have original jurisdiction under 28 U.S.C. §1331 (a).

3. The separate defendants raise individual defenses as to the grounds of liability asserted against them dependent upon the nature and character of their particular individual or corporate functions.

But the complaint alleges acts by each of the defendants, either as corporate bodies or as individuals which participated in or led to the formation of the school district under attack. This allegation is sufficient to hold each party as a defendant in the suit until such time as evidence is produced which relieves that particular defendant from providing the action to secure the injunctive relief sought.

In particular, the Allegheny County School Board alleges that it no longer exists. However, we are in no position at this time to determine whether any liability may be imposed for actions allegedly taken during the period of its corporate existence. A corporate body may have a continued responsibility after its functions have been transferred.

4. The complaint fails to name necessary parties-defendants.

Defendants aver that the complaint fails to join as necessary parties either the adjoining school districts cre-

ated by the reorganization plan, which might be affected by any relief granted, or the General Braddock Area School District which is the reorganized entity of which plaintiffs complain. Defendants reply that these school districts have no rights in or property interest in their existing boundaries. They were created without their own assent, and they may be altered similarly. While these districts might intervene in this action under Fed. R. of Civ. P. 24 if they so desire, the court does not find their absence from this action as a practical matter impairs their ability to protect such interests as they have.

The court takes note from the pleadings that prior state court proceedings were instituted by the individual school boards involved in this reorganization in which they raised objections which were dismissed in the state courts. The constitutional issues now raised were not raised in those state court proceedings.

We have considered all of the objections raised and find none of them sufficient to require dismissal of this complaint. The general rule applicable to all of such objections is that a complaint should not be dismissed unless it appears to a certainty that plaintiff would not be entitled to relief under any set of facts which could be proved in support of his claim. Frederick Hart & Co. Inc. v. Recordgraph Corp., 169 F.2d 580 [3rd Cir., 1953].

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DOROTHY HOOTS, individually and as mother of her children Janelle Hoots and Jamie Hoots, et al., Plaintiffs.

v.

COMMONWEALTH OF PENNSYLVANIA et al., Defendants.

Civ. A. No. 71-538

May 15, 1973

[359 F. Supp. 807 (1973)]

OPINION

WEBER, District Judge.

INTRODUCTION

This is a suit under the federal Civil Rights Act in which plaintiffs, as representatives of a class, allege that residents of the Borough of Braddock, North Braddock and Rankin, in Allegheny County, Pennsylvania, have been deprived of rights, privileges and immunities guaranteed them by the laws and Constitution of the United States by being forced to attend and send their children to a racially segregated school district created by the actions of the various defendants in preparing, approving and adopting plans of reorganization and consolidation of school dis-

tricts in Allegheny County, particularly that creating the General Braddock Area School District, known as Administrative Unit No. 16, within whose boundaries these plaintiffs reside, and the approval of reorganization of surrounding school districts made at about the same time.

A great many of the factual issues in this case were resolved by agreement and stipulation. The statistical data submitted into evidence of the trial was received largely without objection. The defendants submitted two documents as exhibits but offered no testimony. As a result we find the facts to be almost entirely in accord with those findings proposed by plaintiffs' counsel after the close of the evidence. The findings are sufficiently detailed so as to allow us to proceed without a further narrative account of the background of this litigation.

FINDINGS OF FACT

A. Parties

1. Plaintiffs include Addrallace Knight and Barbara Smith.

2. Plaintiff Addrallace Knight is a black woman who has resided in the Borough of Braddock, Pennsylvania, for 20 years and is the mother of three children presently enrolled in the public schools of the General Braddock Area School District in grades 2, 4 and 12, of three children formerly enrolled and still eligible to be enrolled in the public schools of the General Braddock School District, and of two children in college who graduated from the School Districts of Braddock and the General Braddock Area, respectively.[1] T. 2, T. 30.

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[1] "T." refers to the page of the Transcript of Trial.

3. Plaintiff Barbara Smith is a black woman who has resided in the Borough of Braddock for 28 years and is the mother of children enrolled in the public schools of the General Braddock Area School District in grades 3, 4, 5, 9, 10 and 11. T. 63, 64.

4. Plaintiffs Addrallace Knight and Barbara Smith instituted this suit to alter the boundaries of the General Braddock Area School District. T. 30, 63.

5. Named Plaintiffs bring the suit as a class action on behalf of all parents and children residing in the boroughs of Braddock, North Braddock and Rankin. Named Plaintiffs' claims are typical of the claims of the class and named Plaintiffs will fairly and adequately protect the interests of the class. T. 40, 46, 100, 101.

6. Defendant Commonwealth of Pennsylvania has the duty under Article III, Section 14 of the Pennsylvania Constitution, P.S., to maintain and support a thorough and efficient public school system. (Paragraph 35 of Plaintiffs' Complaint, Admitted.)

7. Defendant Commonwealth of Pennsylvania has the ultimate power, authority and responsibility to create school districts and to establish and alter boundaries of the areas served by said school districts. (Paragraph 36 of Plaintiffs' Complaint, Admitted.)

8. Defendant Pennsylvania State Board of Education ["State Board"] is a state administrative board charged with the general supervision and control of the educational interests of the Commonwealth of Pennsylvania, and Defendant W. Deming Lewis is the Chairman of that Board. (Paragraphs 33 and 34 of Plaintiffs' Complaint, Admitted.)

9. Defendant Allegheny Intermediate Unit Board of School Directors is an administrative body which became operative as of July 1, 1971 and is charged with providing the essential services formally provided by the Allegheny County Board of School Directors ["County Board"] and with the administration of the program of services of Intermediate Unit 3 comprising all school districts in the County of Allegheny outside of the City of Pittsburgh, and Defendant Edward X. Hallenberg is the President of such Board. (Paragraphs 38(b) and 38(c) of Plaintiffs' Complaint, Admitted.)

B. School Reorganization Legislation and Standards.

10. During the 1960's the Pennsylvania Legislature on three occasions enacted legislation to reorganize the administrative units (i. e. school districts) in Pennsylvania's public school systems.

(a) the first Act—the Act of September 12, 1961, P.L. 1283, No. 561, 24 P.S. §2-281 et seq. (Act 561)—directed each county board of school directors to prepare on or before January 1, 1963 a plan of organization of administrative units for the County for review by the State Council of Education. 24 P.S. §§2-282, 2-283.[2] S. 1.

(b) Act 561 was superseded by the Act of August 8, 1963, P.L. 564, No. 299, 24 P.S. §2-290 et seq. (Act 299). Act 299 directed each county board of school directors to prepare on or before July 1, 1964 a plan of organization of administrative units for the county and directed the State Council of Basic Education to review organization plans prepared by the county boards and to

[2] The reference to "S" means the paragraph of the Stipulation of Facts, Ex. 61 of the record.

approve such plans as it deemed wise in the best interest of the educational system of the Commonwealth, provided that these plans met certain requirements specified in Act 299. 24 P.S. §§2-292, 2-293. S. 2. In preparing reorganization plans pursuant to Act 299, the county boards were not bound by any proposals contained in reorganization plans prepared pursuant to Act 561, 24 P.S. §2-292. In dealing with school districts which had previously entered into a written agreement for the establishment of a joint school or department, however, the county boards were prohibited from proposing any administrative units which in whole or in part comprised less than all of the school districts joined by such agreement. 24 P.S. §2-292.

(c) Act 299 was superseded by the Act of July 8, 1968, P.L. 299, No. 150, 24 P.S. §2400.1 et seq. (Act 150). Act 150 directed each county board of education to prepare within 90 days a plan of organization of administrative units limited to those school districts within the county which were not in an administrative unit established as a school district under Act 299. 24 P.S. §2400.-2. S. 14.

11. Acts 299 and 150 both provided for the plan of organization of administrative units to conform to standards for approval of administrative units adopted by the State Board and directed the State Board to prepare such standards, taking into account the following factors: topography, pupil population, community characteristics, transportation of pupils, use of existing buildings, existing administrative units, potential population changes and the capability of providing a comprehensive plan of education. 24 P.S. §§2400.1 and 2400.2; 24 P.S. §§2-291 and 2-292. Both Acts also provided that no plan of organization of administrative units should include any proposed

school district with a pupil population of less than 4000 unless the factors listed above were considered by the State Board (or Council of Basic Education) as requiring approval of a plan in which any district contained a pupil population of less than 4000. 24 P.S. §2400.3, 24 P.S. §2-293.

12. Pursuant to the above provisions of Acts 299 and 150, the State Board adopted Standards for Approval of Administrative Units. These Standards, *inter alia* provided that:

> (a) An administrative unit shall make available an educational program and educational opportunities to meet the varying needs, aptitudes, abilities, and interests of individuals residing in the administrative unit.
>
> (b) Consideration should be given to whether a geographic area has developed the characteristics of a community. Community, as used here, includes one or more municipalities and the surrounding territory from where people came for business, social, recreational, fraternal or similar reasons. Neither race or religion shall be a factor in determining administrative unit boundaries and differences in the social and economic level of the population shall not be a basis to determine these boundaries.

A letter from the Superintendent of the Department of Public Instruction advised the County Boards, including the Allegheny County Board, that the intent of the language of the last sentence of the above paragraph was to prevent de jure segregation through the fixing of school district boundaries and that the language was not to be construed to permit de facto

segregation on the basis of race, religion or national origin which is by law prohibited. Exhibit 40, T. 271-276.

(c) An administrative unit shall utilize existing buildings to the maximum extent practical avoiding unnecessary new construction where possible.

(d) Pupil population changes may be considered in the planning of administrative units where the changes are supported by reliable studies of area development showing past pupil population trends and future projections based on recognized statistical methods.

(e) Consideration shall be given to the capability of providing a comprehensive program of education which shall mean the ability to educate and train each child within his capacity to the extent demanded by the immediate requirements of his growth and his relationship to the strengthening of this Commonwealth and nation, and shall include, but not be limited to, wealth per pupil, qualifications of professional staff, enrollment and diversification of curriculum.

Exhibits 12, 60.

C. *School Districts Established by the State and County Boards*

13. In the central eastern area of Allegheny County, east of the City of Pittsburgh and north of the Monongahela River, the County and State Boards established the General Braddock Area School Disrict; the School Districts of Turtle Creek, Swissvale Area, Churchill Area and East Allegheny which border on the General Braddock Area

School District; and the Edgewood School District which is situated within approximately one mile of the General Braddock Area School District. Exhibits 59, 13, 4, 10.

14. The General Braddock Area School District came into being on July 1, 1971 and serves the area consisting of the geographic limits of the Boroughs of Braddock, North Braddock and Rankin. This School District composed of Braddock, North Braddock and Rankin was proposed in the organization plan adopted by the County Board pursuant to Act 150 on October 7, 1968 and was approved by the State Board on May 9, 1969. Prior to July 1, 1971, the School Districts of Braddock, North Braddock and Rankin served the Boroughs of Braddock, North Braddock and Rankin, respectively. S. 15, 21, 24, 26; Ex. 10, 13, 37.

15. The Turtle Creek School District serves the area consisting of the geographic limits of the Boroughs of East Pittsburgh and Turtle Creek. This School District was established pursuant to Act 150. S. 15; Ex. 9, 10, 37.

16. The Swissvale Area School District serves the area consisting of the geographic limits of the boroughs of Braddock Hills and Swissvale. This School District was established pursuant to Act [illegible]0. S. 15; Ex. 9, 10, 37.

17. The Churchill Area School District serves the area consisting of the geographic limits of the municipalities of Chalfont, Churchill, Forest Hills and Wilkins. This School District was established pursuant to Act 299. S. 15; Ex. 4, 10, 13, 36.

18. The East Allegheny School District serves the area consisting of the geographic limits of the municipal-

ities of East McKeesport, North Versailles, Wall and Wilmerding. This School District was established pursuant to Act 299. S. 15; Ex. 4, 10, 13, 36.

19. The Edgewood School District serves the area consisting of the geographic limits of the Borough of Edgewood. This School District was established pursuant to Act 150. S. 15; Ex. 9, 10, 13, 37.

D. *Characteristics of Braddock, North Braddock and Rankin.*

20. Braddock, North Braddock and Rankin are economically depressed, declining communities. T. 47, 48, 66, 120, 135-137.

21. The housing within these three municipalities is old and substandard. Ex. 23, 49; T. 50, 134-135.

22. The residents of these municipalities are poor and less educated. Ex. 20, 50, 51, 56.

23. The municipal taxes of these municipalities are higher than average. Ex. 25.

24. The recreational and shopping facilities within these three municipalities are extremely limited. T. 49-50, 65, 134, 135.

25. The populations of these three municipalities have been rapidly declining at an accelerated pace and becoming increasingly older. From 1930 to 1970 the combined populations of Braddock, North Braddock and Rankin declined from 44,067 to 23,335 and the median age of these populations increased from approximately 27 years in 1940 to approximately 35 years in 1970. Ex. 15, 16.

26. The Boroughs of Braddock, North Braddock and Rankin have no characteristics that will attract or retain persons who have the financial means and opportunity to live elsewhere. T. 47, 48, 64-66, 120, 220, 221, 225-228; Findings of Fact 20-25.

E. *Population Trends—Race*

27. The populations of Braddock, North Braddock and Rankin are becoming increasingly non-white at an accelerated rate. From 1930 to 1970 the percentages of the non-white populations of Braddock, North Braddock and Rankin increased as follows: Braddock—11.54% to 36.33%; North Braddock—2.91% to 11.04%; Rankin—19.56% to 35.48%; and combined populations—9.7% to 24.7%. The largest increase in the non-white percentage of the combined populations of Braddock, North Braddock and Rankin has occurred in the last two decades as is shown in the table below which sets forth the increase in the percentage of non-white population for each of the past four decades:

	1930-1940	1940-1950	1950-1960	1960-1970
Braddock	.7%	4.0%	7.3%	12.8%
North Braddock	.2%	1.8%	2.4%	3.8%
Rankin	2.2%	7.3%	5.0%	1.4%
Combined[3]	.8%	3.7%	4.1%	6.4%

Ex. 15

28. The increase in the percentages of the non-white populations of Braddock, North Braddock and Rankin is

[3] This shows the increase in the non-white percentage of the combined populations of Braddock, North Braddock and Rankin.

attributable almost entirely to a declining white population within these municipalities. From 1930 to 1970 the white populations of these three boroughs decreased as follows:

	1930 White Population	1970 White Population	Loss
Braddock	17,096	5,527	11,569
North Braddock	16,290	9,641	6,649
Rankin	6,391	2,462	3,649
Combined Population	39,777	17,630	22,147

Ex. 15

The greatest portion of the loss in the white populations of these municipalities has occurred in the last two decades as shown in the table below which sets forth the average yearly decline in the white population for each of the past four decades:

	Average Yearly Decline			
	1930-1940	1940-1950	1950-1960	1960-1970
Braddock	91	228	438	399
North Braddock	109	120	176	260
Rankin	55	92	152	94
Combined Loss	265	440	766	744

Ex. 15

29. Over the past four decades there has been an even greater increase in the non-white percentages of the public school populations of Braddock, North Braddock and Rankin. From 1930 to 1972 the non-white percentages of the public school populations of these municipalities increased as follows:

% of Non-White Enrollment

	1930	1960	1970	1972
Braddock	8%	41%	72%	80%
North Braddock	2%	8%	16%	22%
Rankin	17%	34%	51%	57%
Combined	7.1%	23.7%	38.7%	44.5%

Ex. 18

Yearly Increase in Non-White Enrollment

	1930-1960	1960-1970	1970-1972
Braddock	1.1%	3.1%	4%
North Braddock	.2%	.8%	3%
Rankin	.6%	1.7%	3%
Combined	.5%	1.5%	3%

Ex. 18

30. This substantial increase in the non-white percentages of the public school populations of Braddock, North Braddock and Rankin is attributable almost entirely to a steady decline in the white public school populations of Braddock, North Braddock and Rankin over the past 42 years:[4]

White Public School Populations

	1930	1960	1970	1972
Braddock	3,085	1,096	332	198
North Braddock	4,400	2,481	1,955	1,576
Rankin	1,617	685	398	295
Combined	9,102	4,262	2,685	2,069

Ex. 18

[4] From 1930 to 1972 the black public school populations of Braddock, North Braddock and Rankin increased from 696 to 1656.

Average Yearly Decline in White Public School Populations

	1930-1960	1960-1970	1970-1972
Braddock	66	76	67
North Braddock	64	53	190
Rankin	32	29	52
Combined	162	158	309

Ex. 18

31. This Court relies on the uncontradicted testimony of expert witness John A. Finger that there is no basis for believing that the characteristics which caused the decline in the white populations of Braddock, North Braddock and Rankin over the past years have changed; that while all white families may not move out, new white families will not move in and there will be fewer and fewer young white children; that it is extremely likely that these municipalities have reached the tipping point of becoming primarily a black area; and that Braddock and Rankin will become 100% black or nearly so and North Braddock will develop the same characteristics unless remedial action is taken as to the General Braddock Area School District because of the relationship of school population to residential neighborhood stability.[5] T. 219-228.

32. This Court finds that the creation of the General Braddock Area School District is an unstable influence

[5] This testimony is also supported by the data in Exhibit 16 which shows that the white populations of Braddock, North Braddock and Rankin are much older than the black populations of these municipalities: that the younger segments of the populations are becoming increasingly non-white; and that, in fact, the non-white percentage of the combined populations of these municipalities between the ages of 0-14 is twice as great as the non-white percentage of the combined populations over the age of 44.

on the public school populations of Braddock, North Braddock and Rankin that will cause an increasing number of white students to leave the public schools of Braddock, North Braddock and Rankin.[6] T. 40, 104, 288.

33. On the basis of findings of fact 20 through 32, this court finds that there is every reason to believe that the white public school populations of Braddock, North Braddock and Rankin will continue to decline by at least the same number as over the past several years and that the enrollment of the General Braddock Area School Dis-

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[6] In its 1936 Underwriter's Manual the FHA recognized that the development of a neighborhood is strongly influenced by the type of schools:

> "if the children of people living in such an area are compelled to attend school where the majority or a goodly number of the pupils represent a far lower level of society or incompatible racial element, the neighborhood under consideration will prove far less stable and desirable than if this condition did not exist." Bradley v. School Board of City of Richmond, Virginia, D.C., 338 F. Supp. 67, at 215-216. Also see Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, at 20-21, 91 S.Ct. 1267, 28 L.Ed.2d 554.

Note also that in the last two years the annual decline in the white public school populations of Braddock, North Braddock and Rankin doubled primarily because in North Braddock (the source of 76% of General Braddock Area School District's white students) the annual decline in white students increased from 53 to 190. See Finding of Fact 30.

Also see United States v. Board of School Commissioners, Indianapolis, Ind., D.C., 322 F.Supp. 655, at 676, where the Court said:

> "The undisputed evidence in this case . . . is that when the percentage of Negro pupils in a given school approaches 40, more or less, the white exodus becomes accelerated and irreversible."

trict will be almost entirely black within the next five to ten years.

F. Comparison with Neighboring Municipalities

34. The area served by the General Braddock Area School District has perhaps the highest concentration of blacks of any area within Allegheny County served by a single school district. As of 1970 Braddock, Rankin and North Braddock ranked first, second and eleventh, respectively, of the 129 municipalities within the County in terms of their percentage of black residents. Ex. 14

35. This central eastern portion of Allegheny County is generally divided along racial lines. The black residents of this portion of the County are contained within Braddock, North Braddock and Rankin and largely excluded from other municipalities within the area. This is illustrated by the following table which sets forth the black populations as of 1970 for Braddock, North Braddock, Rankin and the other municipalities within the area:

	Black	Total	% Black
Braddock	3139	8682	36.16
North Braddock	1194	10,838	11.02
Rankin	1351	3817	35.39
Chalfont	12	1370	.88
Churchill	5	4690	.11
East McKeesport	26	3233	.80
Braddock Hills	293	2494	11.75
East Pittsburgh	116	3006	3.85
Edgewood	66	5101	1.29
Forest Hills	26	9561	.27
North Versailles	1025	13,416	7.64

	Black	Total	% Black
Swissvale	567	13,891	4.10
Turtle Creek	15	8,308	.18
Wall	32	1,265	2.53
Wilkins	49	8,479	.56
Wilmerding	94	3,218	2.92

36. Pervasive racial discrimination which restricts the housing opportunities of blacks in the eastern portion of Allegheny County is a factor which accounts for the concentration of blacks within Braddock, North Braddock and Rankin. T. 42-43, 70-77; Affidavits of Brock, Cox, DeCostro, Strader.

37. The percentage of non-white enrollment of the General Braddock Area School District is much greater than that of any of the surrounding school districts. As of 1971 the percentages of non-white enrollment of the General Braddock Area School District and surrounding school Districts were as follows:

	44.98
Churchill	.78
Edgewood	6.08
East Allegheny	8.89
Turtle Creek	1.3
Swissvale	9.6

Ex. 17

38. The General Braddock Area School District also has a much greater non-white enrollment than almost every other school district within the entire county. As of 1971 of the 46 school districts operating within Allegheny County (excluding Pittsburgh)[7], only 15 districts had a non-

[7] Pittsburgh is excluded because for organization of administrative units and other purposes the jurisdiction of the County

white enrollment in excess of 5%, only eight districts had a non-white enrollment in excess of 10%, only 4 districts had a non-white enrollment in excess of 30%[8], and only two districts—Wilkinsburg and General Braddock Area—had a non-white enrollment in excess of 40%. Ex. 17

39. The school districts in the vicinity of Braddock and Rankin continually sought to avoid being included in a school district with Braddock and Rankin because of the high concentration of blacks within the Braddock and Rankin School Districts. These surrounding districts proposed to the County and State Boards mergers that would include almost any school districts in the vicinity other than Braddock and Rankin. S. 4, 7, 9, 10, 17, 18; Ex. 5, 7, 8; 35A (p. 11), 42, 46, 47; T. 82-85, 93-100, 107-108, 120-122.

40. The General Braddock Area School District is racially identifiable as a black school district. Findings of Fact 34-39; S. 17, 18; T. 40, 46, 84, 93-95, 98-100, 104, 246, 247, 268-272, 276.

G. *Alternatives to a school district of Braddock, North Braddock and Rankin.*

41. Braddock, North Braddock and Rankin are not geographically isolated; they are easily accessible to most other municipalities within this central eastern portion of

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Board covers all Allegheny County school districts except Pittsburgh.

[8] Of the four districts with a non-white enrollment in excess of 20% (Wilkinsburg, General Braddock Area, Clairton and Duquesne), the General Braddock Area School District was the only newly created school district. The boundaries of the School Districts of Wilkinsburg, Clairton and Duquesne are identical to the municipal boundaries of these municipalities and these boundaries were not affected by school reorganization within Allegheny County. (Exhibit 13)

the County; and they have not historically developed the characteristics of a single community (defined by the Standards for Approval of Administrative Units—Ex. 12—as one or more municipalities and the surrounding territory from which people come for business, social, recreational, fraternal or social reasons). Thus alternatives to a school district comprised of Braddock, North Braddock and Rankin were available to the County and State Boards. Ex. 8, 59; T. 45, 88, 116-119, 131, 133-134.

42. One such alternative was a school district composed of Braddock, North Braddock, Rankin, East Pittsburgh and Turtle Creek. Such a school district as of 1967 would have had an enrollment of 5894 of which approximately 27% would have been non-white. Ex. 17.

The plan of organization of administrative units prepared by the County Board pursuant to Act 299 proposed a school district composed of these five municipalities. The minutes of a meeting of the County Board which discussed this proposed school district state that all members of the Board agreed that this was a satisfactory unit and that this unit met the standards for pupil population, utilization of existing buildings and capabilities of providing comprehensive education. Also a report prepared by the Department of Public Instruction described a unit consisting of these five municipalities as "a natural".[9] S. 3, Ex. 8, 45.

43. A second alternative was a school district composed of Braddock, North Braddock, Rankin, Braddock Hills and East Pittsburgh.

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[9] None of these five municipalities was in a unit established pursuant to Act 299 so the provisions of Act 150 which protected established school districts did not preclude a district composed of these five municipalities. Ex. 4, 10.

The plan of reorganization of administrative units prepared by the County Board pursuant to Act 561 proposed a school district composed of these five school districts. A report prepared by the County Board in connection with the preparation of this plan stated that a district composed of these five municipalities would make possible the placement of every pupil—grades 7, 8 and 9—in a bona fide junior high school and that all senior pupils could have an expanded high school program. S. 1, Ex. 35 (p. 10); T. 83-84.

44. A third alternative was one school district composed of Swissvale, Rankin, Braddock Hills and perhaps Edgewood and a second school district composed of Braddock, North Braddock, Turtle Creek and East Pittsburgh. A school district composed of Swissvale, Rankin, Braddock Hills and Edgewood as of 1967 would have had an enrollment of 3940 of which approximately 14% would have been non-white and a school district composed of Braddock, North Braddock, Turtle Creek and East Pittsburgh would have had an enrollment of 5280 of which approximately 24% would have been non-white.[10] Ex. 17

All witnesses familiar with this area of Allegheny County testified that for geographic reasons alone, Rankin should be in the school district which included Swissvale rather than a school district which included Braddock. The feasibility of placing Rankin in the school district which included Swissvale is so obvious that William Rea, a member of the State Board who heard the appeal of the

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[10] None of these muncipalities was in a unit established pursuant to Act 299 so the provisions of Act 150 protecting established school districts did not preclude the Boards from proposing the alternative suggested in finding of fact 44.

Rankin School District from the County Board's plan which combined Braddock, North Braddock and Rankin into one school district, asked if there was any way the State Board could find out why the County put Rankin with Braddock and North Braddock "rather than the logical geographical thing, looking at the map, of Swissvale, because it seems to me that the State Board needs to have some reasons here." T. 88, 131, 134; Ex. 54 (p. 23); Ex. 59.

45. A review of the map of this central eastern area of Allegheny County indicates that at least from the standpoint of transportation, other alternatives (in addition to the three mentioned above) to a school district composed of Braddock, North Braddock and Rankin could also have been selected. Ex. 59, Ex. 11.

H. *Refusal to Properly Consider Race.*

46. On the basis of the uncontradicted testimony presented by plaintiffs' expert witnesses, this Court finds that in establishing boundary lines for school districts, the racial composition of the student body of the proposed school district is an important factor to be considered to maximize the social and educational benefits which accrue from attending a racially integrated school system and to minimize the foreseeable and avoidable adverse social and educational effects which result from attending racially segregated schools. T. 162, 163, 232-234, 264-5; Ex. 58, 41.

47. On the basis of the uncontradicted testimony presented by plaintiffs' expert witnesses, this court finds that there is no educational or other valid justification for disregarding racial criteria in establishing school district boundary lines. T. 162-168, 234-239, 271-275.

48. In preparing and adopting the plan of organization of administrative units which combined Braddock, North Braddock and Rankin into one school district pursuant to Act 150, the County and State Boards refused to give consideration to the foreseeable and avoidable adverse educational and racial effects that could result from the concentration of black pupils within this proposed school district. S. 19, 23.

49. This court finds that if the County and State Boards had properly considered race in preparing and approving a plan of organization of administrative units for Allegheny County pursuant to Act 150, these Boards would not have approved a plan which combined Braddock, North Braddock and Rankin into a single school district. In support of this finding this court relies on the uncontradicted testimony of plaintiffs' expert witnesses that had race been properly considered, for educational reasons alone the Boards would not have concentrated the black residents of this area within this one school system. T. 162, 166-168, 244, 268-271, 276-277.

50. This Court accepts the uncontradicted testimony of plaintiffs' expert witnesses that on the basis of the demographic data which was clearly available, the State and County Boards knew or should have known they were creating a racially segregated school district as of the dates they proposed and approved a school district composed of Braddock, North Braddock and Rankin. T. 219-224, 230-232, 251-253, 276-277.

Demographic data available to these Boards as of such dates included information on the racial composition of the public schools of Braddock, North Braddock and Rankin and surrounding school districts (S. 6, 17, 22, Ex. 47) as well as data of the U. S. Census Bureau and public

schools of Braddock, North Braddock and Rankin showing the population trends by race of the public school populations and general populations of Braddock, North Braddock, Rankin and surrounding areas. (See, for example, Exhibits 15, 16 and 18).

Merely by considering the data collected by the County Board and Department of Public Instruction showing the white and non-white enrollment in each school district within Allegheny County as of 1964 and 1967 (Exhibit 17), the County and State Boards should have known that a school district of Braddock, North Braddock and Rankin would be a racially segregated school district that would become increasingly non-white. As of 1967, Braddock, Rankin and North Braddock ranked 1, 2 and 7 of the 61 school districts in Allegheny County (excluding Pittsburgh) in terms of percent of non-white enrollment and, as the table below shows, were the only school districts within this central eastern portion of Allegheny County with a significant concentration of non-white students:

	Percent of non-white students	
	1964	1967
Braddock	56.69	63.84
North Braddock	14.22	19.62
Rankin	44.7	51.30
East Pittsburgh	14.15	6.08
Turtle Creek	0.00	0.00
Swissvale	5.5	9.91
Edgewood	0.00	0.00
Churchill	.17	0.41
East Allegheny	—	9.88

Ex. 17

51. The County and State Boards maximized racial segregation within the public schools of this central eastern

portion of Allegheny County by creating a school district composed of Braddock, North Braddock and Rankin. As of the dates on which the County Board prepared and State Board approved the combining of the school districts of Braddock, North Braddock and Rankin into a single school district, no other combination of school districts within this portion of Allegheny County would have created a school district (of at least 4,000 pupils as required by Act 150) with as large a percentage of non-white enrollment as the combination of Braddock, North Braddock and Rankin. See Ex. 17.

I. *The Boards' plan disregarded Standards for School Reorganization as well as recognized educational standards.*

52. The plan of organization of administrative units adopted by the County and State Boards pursuant to Act 150 for the central eastern portion of Allegheny County failed to meet many essential requirements of Act 150, the State Board Standards for Approval of Administrative Units ("State Board Standards"), policies of the Department of Public Instruction and Human Relations Commission of Pennsylvania, and recognized educational standards. T. 157-162, 235-241, 262-265, 268-272, 277-281. Examples of essential requests that weren't met include:

(a) Act 150 required that each proposed school district have a pupil population of at least 4000 (unless a smaller school district was required). See Finding of Fact 11. The plan adopted by the County and State Boards completely disregarded this requirement by combining the school districts of East Pittsburgh and Turtle Creek which had a 1967 combined enrollment of 1898[11],

[11] It is noted that as of 1964 the County Board recognized that a school district of Turtle Creek and East Pittsburgh would

by combining the school districts of Braddock Hills and Swissvale which had a 1967 combined enrollment of 1925 and by permitting to stand alone the school district of Edgewood which had a 1967 pupil population of 928, Ex. 37; T. 159-161, 239-241. Even the school district of Braddock, North Braddock and Rankin violated the spirit of this requirement because as of 1967 it was obvious that the enrollment within these districts (which was slightly in excess of 4000) was declining rapidly and that the pupil population of this district would stabilize at a population far below 4000.[12]

(b) The State Standards as well as recognized educational standards require creation of school districts capable of providing a comprehensive program of education. Finding of Fact 12e. Because of the concentration of nonwhite children from poor and educationally-deprived homes within the district, the General Braddock Area School District did not meet this requirement according to uncontradicted testimony of plaintiffs' expert witnesses. T. 161, 162, 241-246, 277-281.

(c) Guidelines of the Department of Public Instruction and the Human Relations Commission of Pennsylvania in effect prior to the County Board's preparation of the plan of administrative units pursuant to Act 150 (as well as accepted educational standards) recognize the importance of the presence of children from varied backgrounds within every school building. Such policy spe-

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not comply with the state pupil population requirements and therefore it refused to consider such a school district. Ex. 45, 6. At that time Turtle Creek-East Pittsburgh public school population was 2234. (Ex. 36.)

[12] State Board standards permitted consideration of population changes. See Findings of Fact 12a.

cifically provides that any action which fosters racial segregation in the public schools is against the public interest and should not be taken by any public agency. Ex. 58, 41. T. 264, 265. The County and State Boards acted contrary to these guidelines (as well as the policy expressed in the letter from the Superintendent of the Department of Public Instruction stating that de facto segregation on the basis of race is by law prohibited—(see finding of fact 12b)) by concentrating black children and children from poor, educationally deprived homes within one single school district. T. 158-159, 234-238, 241-246, 258-265, 268-276, 283-284.

(d) The County and State Boards also ignored the State Board Standard requiring maximum utilization of existing buildings by separating East Pittsburgh from North Braddock because of North Braddock's need for school buildings situated within East Pittsburgh. Finding of Fact 12c. Ex. 6, 7, 45.

53. Alternatives to a school district composed of Braddock, North Braddock and Rankin were available that would have been more consistent with the provisions of Act 150, the State Board Standards for Approval of Administrative Units and recognized educational standards. Such alternatives include those set forth in findings of fact 42-44. T. 157-162, 241-242, 244-246.

54. In view of the availability of these alternatives, the decision of the County and State Boards to create a school district composed of Braddock, North Braddock and Rankin was contrary to recognized education standards, the provisions of Act 150, the Standards for Approval of Administrative Units of the State Board, and policies of the Department of Public Instruction and Hu-

man Relations Commission. T. 157-162, 241-242, 244-246.

55. These alternatives previously referred to that would have been more consistent with the provisions of Act 150, the Standards for Approval of Administrative Units of the State Board recognized education standards and the policies of the Department of Public Instruction and Human Relations Commission would have permitted the black public school population of Braddock, North Braddock and Rankin to attend substantially more integrated public school systems. Ex. 17, Findings of Fact 42, 44, T. 158-162.

J. *General Conclusions*

56. On the basis of Findings of Fact 27 through 55 and the uncontradictory testimony of plaintiffs' expert witnesses, this Court finds that by combining Braddock, North Braddock and Rankin into one school district, the County and State Boards created a racially segregated school district. T. 247, 276, 219-227, 246-247, 276-277, 262-271.

57. On the basis of Findings of Fact 20 through 55 this Court finds that the natural, foreseeable and actual effect of combining Braddock, North Braddock and Rankin into one school district was to perpetuate, exacerbate and maximize racial segregation within the public schools of this central eastern portion of Allegheny County.

58. On the basis of Findings of Fact 27 through 51 this Court finds that by combining the three municipalities within which most of the black population of the area resides into a single school district the County and State Boards built on the pattern of residential segregation within this central eastern portion of Allegheny County, the

inevitable effect of which was to maintain, perpetuate, exacerbate, maximize and otherwise impose racial segregation in the public schools of this central eastern portion of the County.

59. On the basis of Findings of Fact 27 through 55 this Court finds that the County and State Boards devised this plan of organization of administrative units which combined Braddock, North Braddock and Rankin into one school district to satisfy the desires of as many of the surrounding municipalities as possible to be placed in a school district which did not include Braddock and Rankin. This Court can find no other explanation for the Boards' creating a school district composed of Braddock, North Braddock and Rankin and defendants have offered no explanation as to why this school district was created to refute the testimony of plaintiffs' expert witnesses that the creation of this school district cannot be justified under recognized educational standards, the provisions of Act 150 or the Standards for Approval promulgated by the State Board.

60. Because the State and County Boards in devising this plan of organization of administrative units for the central eastern portion of Allegheny County were influenced by the desires of the surrounding municipalities to avoid being placed in a school district with Braddock and Rankin because of the high concentration of blacks within these two municipalities, race was a factor, at least indirectly, in the formation of the school district composed of Braddock, North Braddock and Rankin.

61. The Record contains absolutely no evidence showing that the school district boundaries established in the County and State Boards' plan of organization of ad-

ministrative units are rationally related to any legitimate purpose and this Court finds that such boundaries do not promote any valid state interest. T. 158-162, 239-242, 244-246, 277-281; Findings of Fact 20 through 55.

DISCUSSION—JOINDER OF NECESSARY PARTIES

The only issue of law seriously contested in these proceedings has been the necessity of joinder of the school districts surrounding the General Braddock Area School District.

Fed.R.Civ. 19(a) requires the joinder of a party (1) whose absence prevents the granting of complete relief to the present parties, and (2) whose interest is such that his absence may impair his ability to protect that interest or submit the present party to multiple or inconsistent obligations.

The absence of the surrounding school districts does not affect the complete relief available to existing parties. The power to draw school district boundaries rests solely with the Commonwealth of Pennsylvania and the Pennsylvania State Board of Education. Local school districts have no power or control over their own boundaries. They can be altered at anytime by the Commonwealth. The surrounding school districts have no legal right to have their existing boundaries maintained and consequently they have no legal interest under the provisions of Fed. R.Civ.P. 19 which can be affected by the outcome of this litigation.

While surrounding school districts may be concerned with the results of this litigation and even be affected by it, this does not require their joinder under Fed.R. Civ.P. 19.

In Griffin v. State Board of Education, 239 F.Supp. 560 [E.D.Va.1965] where public agencies were enjoined from paying tuition grants for use by private schools which practiced racial discrimination, it was held not necessary to join the private school's name. "The overriding answer is that no complaint is made against the schools themselves. The complaint is against the payers and not the ultimate recipients of the grant. It is the power to give, not the right to receive, which is in issue." (p. 566). Permissive intervention was allowed to such private schools in Poindexter v. Louisiana Financial Assistance Commission, 258 F.Supp. 158 [E.D.La.1966], aff'd, 389 U.S. 571, 88 S.Ct. 693, 19 L.Ed.2d 780 [1968], the trial court stating: "These schools are not necessary parties, as far as the constitutionality of the tuition grant system is concerned." (p. 167).

We may note that the surrounding school districts were aware of this suit. The Attorney General of the Commonwealth of Pennsylvania sent letters on May 19, 1972 to four surrounding school districts informing them of the action and enclosing a copy of the complaint. He advised them that if relief were granted the present boundaries of their districts would undoubtedly be changed. He urged their immediate intervention. (Ex. 54 T. 4.) Also, a week before trial the Attorney General sent telegrams advising them that he would again move to compel their joinder, and urging them to intervene. (T. 3-4.) None chose to act.

We do not overlook the possibility that the adjoining districts may be required to be joined at some further stage of the proceedings, if such are necessary under our retention of jurisdiction of this matter. We shall provide in our order that the Commonwealth and the State Board

allow the adjoining districts to be heard on the matter of developing a plan of desegregation.

We have, therefore, denied defendants' motions based on failure to join a necessary party under Fed.R.Civ.P. 19 up to the present stage of the proceedings.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter of this action under 28 U.S.C. §§1331-(a), 1343(3) and (4), 2201 and 2202; 42 U.S.C. §§1983 and 1988.

2. A violation of the Fourteenth Amendment has occurred when public school authorities have made educational policy decisions which were based wholly or in part on considerations of the race of students and which contributed to increasing racial segregation in the public schools. Kelly v. Guinn, 456 F.2d 100, 105-108 [9th Cir. 1972], petition for cert. filed, 41 U.S.L.W. 3114 [U.S. Sept. 12, 1972] [No. 72-341]; Davis v. School District of City of Pontiac, Inc., 443 F.2d 573 [6th Cir. 1971], cert. denied, 404 U.S. 913, 92 S.Ct. 233, 30 L.Ed.2d 186 [1971]; Spangler v. Pasadena City Board of Education, 311 F.Supp. 501, 521 [C.D.Cal. 1970], and cases cited therein.

3. School authorities may not, consistent with the Fourteenth Amendment, maintain segregated schools or permit educational choices contributing to the development and growth of segregated schools because of community sentiment or the wishes of a majority of voters. Bradley v. Milliken, [6th Cir. Dec. 8, 1972 slip opinion], aff'g 345 F.Supp. 914 [E.D.Mich. 1972], same 338 F.Supp. 582, 593 [1972]; United States v. School District 151 of Cook County, Ill., 432 F.2d 1147 [7th Cir. 1970] aff'g

301 F.Supp. 201, 230 [N.D.Ill.1969], cert. denied, 402 U.S. 943, 91 S.Ct. 1610, 29 L.Ed.2d 111 [1971] and cases cited therein; Johnson v. San Francisco Unified School District, 339 F.Supp. 1315, 1341 [N.D.Cal.1971] and cases cited therein; Spangler v. Pasadena City Board of Education, *supra*, 311 F.Supp. at 523 and cases cited therein.

4. School authorities are accountable for the natural, probable and foreseeable consequences of their policies and practices, and where racially identifiable schools are the result of such policies, the school authorities bear the burden of showing that such policies are based on educationally required, non-racial considerations. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 25-26, 91 S.Ct. 1267, 28 L.Ed.2d 554 [1971]; Bradley v. Milliken, *supra*, 338 F.Supp. at 592 and cases cited therein; Kelly v. Guinn, *supra*, 456 F.2d at 105-107; United States v. School District 151 of Cook County, Ill., *supra*, 301 F.Supp. at 320.

5. The County and State Boards acted contrary to the Fourteenth Amendment by selecting school district boundaries for the central eastern portion of Allegheny County which conformed to and built upon patterns of residential segregation in this area of the county. Bradley v. Milliken, *supra*, slip opinion, at 9-10; Davis v. School District of Pontiac, *supra*, Sloan v. Tenth School District of Wilson County, Tenn., 433 F.2d 587, 589 [6th Cir. 1970]; United States v. Board of Education, Ind. School Dist. No. 1, Tulsa County, Okl., 429 F.2d 1253, 1259 [10th Cir. 1970]; Brewer v. School Board of City of Norfolk, Va., 397 F.2d 37, 42 [4th Cir. 1968]; Spangler v. Pasadena City Board of Education, *supra*, 311 F.Supp. at 522.

6. When the natural and foreseeable consequences of actions taken by school authorities are to preserve segregation within the public schools or to hamper its removal, such actions violate the Fourteenth Amendment. Bradley v. Milliken, *supra;* United States v. Texas Education Agency, 467 F.2d 848, 863-864 [5th Cir. 1972] and cases cited therein at n.23; United States v. School District 151 of Cook County, Ill., *supra,* 404 F.2d 1125; Spangler v. Pasadena City Board of Education, *supra.*

7. The natural, foreseeable and actual effect of combining Braddock, North Braddock and Rankin into a single school district was to perpetuate, exacerbate and maximize segregation of school pupils. Such conduct constituted an act of *de jure* discrimination in violation of the Fourteenth Amendment. Bradley v. Milliken, *supra,* 345 F.Supp. at 939-940; Kelly v. Guinn, *supra;* Davis v. School District of City of Pontiac, Inc., *supra,* 443 F.2d 573 at 576; Sloan v. Tenth School District of Wilson County, Tenn., *supra,* 433 F.2d at 590; United States v. Board of Education, Ind. School Dist. No. 1, Tulsa County, Okl., *supra,* 429 F.2d at 1259 and cases cited therein; Johnson v. San Francisco Unified School District, *supra,* 339 F.Supp. 1341 and cases cited therein; Spangler v. Pasadena City Board of Education, *supra,* 311 F.Supp. at 522.

8. While the state may have no affirmative duty to eliminate public school segregation when it has done nothing to create it, nevertheless when it seeks change it must proceed in a fashion that will lessen previously existing school segregation. Bradley v. Milliken, *supra;* United States v. Texas Education Agency, *supra,* 467 F.2d at 863-864; Davis v. School District of City of Pontiac, Inc.

supra; Spangler v. Pasadena City Board of Education, *supra,* 311 F.Supp. at 522-523.

9. The State and County Boards' refusal to consider racial criteria in adopting the plan of organization of administrative units pursuant to Act 150 constituted an explicit racial classification in that educational matters related to racial criteria were treated differently from educational matters related to other criteria. Lee v. Nyquist, 402 U.S. 935, 91 S.Ct. 1618, 29 L.Ed.2d 105 [1971] aff'g 318 F.Supp. 710 [W.D.N.Y.1970] (three judge); Hunter v. Erickson, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed. 2d 616 [1969]; Bradley v. Milliken, 433 F.2d 897, 902-904 [6th Cir. 1970] and cases cited therein. Racial classifications are constitutionally suspect and will be upheld only if absolutely necessary to the accomplishment of a permissible state policy. Hunter v. Erickson, *supra;* Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 [1967]; McLaughlin v. Florida, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 [1964].

10. A violation of the Fourteenth Amendment's prohibition against discrimination having been found, this Court has continuing jurisdiction of this action for all purposes including the granting of effective relief. Brown v. Board of Education of Topeka, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 [1955]; Bradley v. Milliken, *supra,* slip opinion at 53; 345 F.Supp. at 937; Kelley v. Altheimer Ark. Public School Dist. No. 22, 378 F.2d 483, 489 [8th Cir. 1967].

11. On the basis of this Court's findings of unconstitutional school segregation, the present constitutional obligation of defendant school authorities is at the earliest possible time to adopt and implement an educationally sound, practicable plan of desegregation that promises

realistically to achieve now and hereafter the greatest possible degree of actual school desegregation. Swann v. Charlotte-Mecklenburg School Board of Education, *supra;* Green v. County School Board, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 [1968]; Bradley v. Milliken, *supra,* 345 F.Supp. at 937 and cases cited therein.

12. The remedial obligation rests with school authorities; but where in any way they fail, or are unable because of the circumstances of the case, to fulfill any part of the obligation promptly and fully, this court has broad equity power, and the duty to insure that demonstrable progress be made now; that a schedule for planning be adopted forthwith; and that necessary planning be specifically ordered and immediately undertaken in order that a constitutionally adequate plan may be fashioned, and implemented as soon as possible. Swann v. Charlotte-Mecklenburg School Board of Education, *supra;* Carter v. West Feliciana School Bd., 396 U.S. 290, 90 S.Ct. 608, 24 L.Ed.2d 477 [1970], same 396 U.S. 226, 227-228, 90 S.Ct. 467, 24 L.Ed.2d 382 [1969]; Bradley v. Milliken, *supra,* 345 F.Supp. at 938; Acree v. County Bd. of Education of Richmond Co., Ga., 458 F.2d 486 [5th Cir. 1972]; Pennsylvania Ass'n Retard. Child. v. Commonwealth of Pa., 334 F.Supp. 1257, 1266-1267 [E.D.Pa.1971]; Fed. R.Civ.P. 52.

ORDER

And now, this 15th day of May, 1973, this Court having found that the County and State Boards acted contrary to the Constitution in adopting the plan of organization of administrative units which combined Braddock, North Braddock and Rankin into a single school district, it is hereby ordered and directed that:

(1) Defendants Commonwealth of Pennsylvania, The Pennsylvania State Board of Education, and W. Deming Lewis shall prepare and submit to this Court within 45 days from the date of this Order a comprehensive plan of school desegregation for the central eastern area of Allegheny County to remedy the Constitutional violations found by this Court, which plan shall become final unless objected to by plaintiffs within 20 days after it is filed with the Court.

(2) Such plan shall meet the following standards:

(a) the plan shall alter the boundary lines of the General Braddock Area School District and, as appropriate, of adjacent and/or near-by school districts.

(b) the plan shall be an educationally sound and practical plan of desegregation that promises now and hereafter to achieve the greatest possible degree of desegregation within the public schools of the central eastern area of Allegheny County, taking into account the practicalities of the situation.

(c) the plan shall set forth the dates on which it shall go into effect, which dates shall be set as early as possible.

(3) Defendants Allegheny Intermediate Unit Board of School Directors, and Edward Hallenberg, its President, shall assist in the preparation of the plan in all respects within their special area of responsibility and to the fullest extent render the benefits of their expertise and knowledge of local facilities and resources so that the terms of this order may be carried out by the other Defendants.

(4) In preparing said desegregation plan it is anticipated that defendants will consider the factor of racial balance along with other educationally relevant criteria and that the plan submitted by defendants will be consistent with the policies of the Department of Public Instruction and Human Relations of Pennsylvania relating to school integration.

(5) Defendants shall give each school district whose boundaries may be altered by said school desegregation plan the opportunity to be heard prior to the adoption of a final plan.

(6) Until said school desegregation plan is finally approved by this Court, defendants are hereby enjoined and restrained from taking any action, directly or indirectly, that may in any way limit or otherwise affect any school assignment options that could possibly be considered or proposed by any parties to this action.

(7) This Court expressly retains complete and continuing jurisdiction to modify this final judgment and decree on its own motion or on motion of any party.

(8) This judgment and decree shall take effect immediately.

UNITED STATES COURT OF APPEALS, THIRD CIRCUIT

Dorothy HOOTS, Individually and as mother of her children Janelle Hoots et al., Appellees,

v.

COMMONWEALTH OF PENNSYLVANIA et al.

Appeal of TURTLE CREEK AREA SCHOOL DISTRICT.

Appeal of CHURCHILL AREA SCHOOL DISTRICT ALLEGHENY COUNTY.

Nos. 73-1783, 73-1784, 74-1050, and 74-1051.

Argued Feb. 28, 1974.

Decided April 18, 1974.

[495 F.2d 1095 (1974)]

OPINION OF THE COURT

PER CURIAM:

The underlying action which gave rise to these appeals is a class action brought against the Commonwealth of Pennsylvania, the Pennsylvania State Board of Education, the Allegheny County Board of School Directors, the Allegheny Intermediate Unit Board of School Directors and various individuals as officials of these bodies. The complaint was filed on June 9, 1971 and alleged that the

defendants intentionally and knowingly drew boundary lines for the new consolidated school districts in the central eastern area of Allegheny County, and specifically for the General Braddock Area School District, in a way that perpetuated and maximized racial segregation in violation of the equal protection clause. On May 15, 1973, the district court found in favor of the plaintiffs and ordered the Commonwealth defendants to prepare and adopt a comprehensive plan of school desegregation for that area of Allegheny County.

No appeal from this decision was filed by any of the named defendants, but on June 12, 1973, the Turtle Creek Area School District ("Turtle Creek"), a local school district likely to be affected by the desegregation plan, filed a petition to intervene in the case as a party defendant in order to take an appeal. On June 13, 1973, Churchill Area School District ("Churchill"), a similarly situated local school district, took the same action. These petitions to intervene were denied by the district court on June 13, 1973 and these denials as well as various exceptions to the May 15, 1973 judgment of the district court itself form the basis for appeals No. 73-1783 and No. 73-1784.

Subsequent to the filing of these appeals, the Commonwealth defendants submitted a proposed desegregation plan to the district court. Turtle Creek and Churchill as well as the other school districts affected under the plan, thereupon filed new petitions to intervene. The district court permitted intervention at this point for the limited purpose of presenting argument on the issues of 1) whether the Commonwealth's plan complied with the district court's order of May 15, 1973 and 2) whether the Commonwealth abused its discretion in choosing the plan it

submitted for approval. However, it refused to permit the school boards to intervene as defendants for all purposes.[1] This denial as it relates to Turtle Creek and Churchill, is the basis for appeals No. 74-1050 and No. 74-1051.[2] These appeals and the earlier ones have been consolidated since they involve the same issues.

While the parties that have brought this appeal have undertaken a broad attack upon the district court's judgment of May 15, 1973, the crucial threshold question is whether their petitions to intervene were properly denied. If they were, Churchill and Turtle Creek are not parties to the action and cannot appeal the judgment of the district court.[3] We have concluded that the denial of these petitions was proper, and as a result, the appeals will be dismissed.

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[1] Had general intervention been permitted, most of the school boards would have sought to reopen the record so that they could present arguments in opposition to the district court's May 15, 1973 judgment of liability.

[2] Naturally, since the plaintiffs have not filed an appeal, our decision in no way affects the district court's order *granting* limited intervention.

[3] While Churchill and Turtle Creek rely primarily upon their asserted status as intervenors to establish their right to appeal the district court's judgment, they also suggest that this right is established under Federal Rule of Civil Procedure 19 which provides for compulsory joinder of indispensable parties. This argument begins with the local school districts' assertion that they are indispensable parties and that the district court erred when it rejected the named defendants' motion to have them so named. They go on to contend that this question can be raised by this court *sua sponte* so that even if they do not qualify as intervenors, we should still bring them into the action under Rule 19 and permit them to attack the judgment of the district court.

As the Supreme Court has recently made clear, it is within the discretion of the district court to deny a petition to intervene if it is not timely NAACP v. New York, 413 U.S. 345, 93 S.Ct. 2591, 37 L.Ed.2d 648 (1973). In the instant case, the untimeliness of the various petitions is clear. The first petition was not filed until June 12, 1973, two years after the case was originally filed, six months after the trial, and almost a month after the district court's opinion and order were filed.

Moreover, the petitioners could not reasonably claim ignorance either of the proceedings or the necessity for intervention at a much earlier date. On May 19, 1972, (more than six months before trial) the Attorney-General

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This argument is not meritorious. While courts of appeals have raised questions as to the absence of indispensable parties *sua sponte*, J. Moore, Federal Practice ¶19.19 at 2582 they have done so only when an appeal had already been properly brought by one of the parties to the action. *See* cases cited *id.* note 11. We do not feel that it is appropriate to take the same approach in cases such as this, where the only "appeal" to this court has been initiated by non-parties. In these circumstances, we can reach the indispensable party question only if we reach out on our own initiative and upset proceedings before the district court that have proved satisfactory to all of the present parties to the case. This would create an unwarranted interference with the work of the district courts.

It may be that a non-party's rights are so affected in a particular case that he should have the right to initiate an appeal. However, he must first make himself a party to the action by filing a petition to intervene under Rule 24 and by meeting the requirements that exist for successful intervention. We will not create a procedure that would allow him to circumvent these requirements by petitioning this court directly for a decision that declares him to be an indispensable party under Rule 19.

of Pennsylvania sent identical letters to Turtle Creek and Churchill that informed them of the suit and noted that the relief requested would have an important effect on the future of their districts.[4] The letter then indicated that the Attorney-General's position in the litigation would have to reflect the interests of the Commonwealth as a whole and that as a result it probably would not reflect the interests of the local school districts. It closed with the following suggestion:

> "I, therefore, urge you to intervene in this action immediately if you wish the viewpoint of your school district and your constitutents to be represented and presented before the trier of fact and of law."

This letter, at the very least, put the school districts on notice to be alert to the likely necessity for intervention. Yet despite this clear warning, no petition to intervene was filed until June 12, 1973, six months after the December 1972 trial. Since the necessity for intervention was apparent at least by time of trial,[5] the failure of Turtle Creek and Churchill to act until months later makes the petitions ultimately filed untimely. *See* NAACP v. New York, *supra.* The petitions for intervention filed in June and October of 1973 were properly denied.

The appeal will be dismissed.

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[4] A copy of the amended complaint accompanied the letter.

[5] By that time the following papers were of record and available for the school districts' review: Plaintiffs' proposed stipulation of facts; plaintiffs' pretrial statement; County defendants' pretrial statement; Commonwealth defendants' pretrial statement; the pretrial stipulation; and plaintiffs' summary of opinion evidence.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNNSYLVANIA

Dorothy HOOTS, Individually and as mother of her children Janelle Hoots and Jamie Hoots, * * * [et al.]

v.

COMMONWEALTH OF PENNSYLVANIA * * * [et al.]

Civ. A. No. 71-538

March 5, 1981

[510 F. Supp. 615 (1981)]

OPINION

WEBER, Chief Judge.

In 1973, this court found the General Braddock Area School District was a racially segregated district, created by the Commonwealth of Pennsylvania through its state and county Boards. Since that time, the court has heard testimony on several plans designed to desegregate the school system. At this stage, however, no further decisions on an appropriate plan can be made until it is determined which, if any, of the surrounding school districts can be included in any remedy within the guidelines of *Milliken v. Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L. Ed.2d 1069 (1974). (*Milliken I*).

This was a matter set down for briefing and argument in August 1980 at the time of extensive hearings on this case. Our consideration and determination of this matter was interrupted and delayed by the abrupt change of position of plaintiffs' counsel, the interlocutory appeal which followed, and the five months' wait until the decision of the Court of Appeals, 3rd Cir., 639 F.2d 972, on this matter. Now that it is back with this court time was required to refresh recollection and review files before determining what might have been determined in September 1980. The court has relied on the arguments made at that time and the extensive briefs filed at various points to arrive at the following conclusions.

Milliken held that a multi-district remedy was impermissible where the court has found a condition of segregation in only one district, unless it can be shown that the violation was caused by the acts of adjacent school districts.

> The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann,* [*v. Charlotte-Mecklenburg Bd. of Ed.*] 402 U.S., [1] at 16 [9] S.Ct. 1267, at 1276, 28 L.Ed.2d 554]. Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of inter-

district segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.

Milliken v. Bradley, supra at p. 744-45, 94 S.Ct. at 3126-27.

Before any proposed remedy can be fully considered we must review the facts of this case to determine whether an interdistrict remedy is appropriate here or whether any remedy imposed must be limited in its application to less than all of the districts joined herein. It begins to appear that there is no possible remedy that would effectively desegregate General Braddock that does not include many neighboring school districts. Because an interdistrict remedy may be the only remedy available to the court, we must review the facts of this case to determine whether such a remedy is appropriate here.

Furthermore, from the testimony produced at the hearings on the tuition plan it becomes more evident that an interdistrict remedy that does not include a broad area would be a futile judicial exercise because limiting the remedy to only some of the districts, or the adjacent districts, would enlarge the size of the segregated district because the school population in some nearby districts approaches the degree of minority concentration existing in

General Braddock Area School District. The focus of the infection would metastasize; a super General Braddock Area School District would be created with the same problem. The same consideration required that we reject Plan 22-W because the inclusion of Wilkinsburg completely upset the racial balance sought.

The General Braddock Area School District was created as a result of a reorganization of school districts initiated by the Commonwealth and accomplished by three specific pieces of legislation.

Prior to 1961, the Pennsylvania Public School Code of 1949, 24 P.S. §2-251 allowed school districts to merge voluntarily. Thereafter there was a series of statutes compelling mergers. The Commonwealth first passed the Act of September 12, 1961, P.L. 1283, No. 561, 24 P.S. §2-281 et seq. [Act 561] to effectuate the state's goal of achieving comprehensive programs of education through larger school districts. Although the Act recognized voluntary merger of districts this was the first Act to set up a compulsory system of reorganization and merger and provided that each county board of school directors should prepare a plan of organization of administrative units for the county for review by the State Council of Education by Jan. 1, 1963. 24 P.S. §§2-282, 2-283. *State Board of Education v. Franklin Township School District*, 209 Pa. Super. 410, 228 A.2d 221, 223 (1967). Once submitted by the county board, the State Board would review the plan for approval taking into consideration certain environmental criteria, including topography, pupil population, socio-economic characteristics, facility of transportation of pupils, utilization of existing school buildings, existing administrative units, and potential population changes. 24 P.S. §2-281. After review, the State Board

could reject or rewrite those plans that it did not consider "wise in the best interests of the educational system of the Commonwealth". It was further provided specifically that the State Board could not approve any plan for an administrative unit which contained a student population of less than 4,000 pupils unless the above criteria were considered and the Board found that the situation necessitated the lower student population. In no event, however, was the State Board to approve any administrative unit with less than 2,500 pupils. 24 P.S. §2-283. Once approved, the administrative units were to become operative in 1965.

At the time Act 561 was passed, the following school districts operated in central eastern Allegheny County: Wilmerding, North Versailles, Gateway, Turtle Creek, East Pittsburgh, Braddock, North Braddock, Rankin, Braddock Hills, Swissvale, Edgewood, Wilkens, and Forest Hills.[1] On May 15, 1962, before the County Board had established a plan for reorganization, Wilkens and Forest Hills areas voted to voluntarily merge into a single district known as Churchill. Churchill was later approved by the State Board on June 25, 1962. Allegheny County did submit a reorganization plan under Act 561 which was approved by the State Board, but before the effective date of 1965.

Act 299 (Act of August 8, 1963, P.L. 564, No. 299, 24 P.S. §2-290 et seq.) was passed to replace Act 561. Act 299 contained the same basic provisions as Act 561, but included a three-tiered appeals process for "aggrieved" school districts. The criteria for reorganization and the

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[1] Several of these districts did not maintain their own high schools but utilized a tuition plan with neighboring districts.

minimum 4,000 pupil population provision were both carried over. Act 299 however, expressly reserved to the State and County Boards the right to reconsider its approval of previously joined districts (ones formed by voluntary merger prior to Act 299) and to be remerged into even different and larger districts. 24 P.S. §2-292. Therefore, any administrative units that had been approved under Act 561 would still come under the authority of Act 299 and the County was effectively operating from a clean slate.

Although aware of strenuous objections to the proposed plan submitted by the County Board, at its meeting on September 6, 1964, the State Board approved the following administrative units: Unit 14 (Gateway); Unit 15 (Wilkens and Forest Hills combining to form Churchill); Unit 18 (Wilmerding and North Versailles combining to form East Allegheny) and Unit 38 (Braddock Hills, Edgewood, and Swissvale). As a result, Units 14, 15 and 18 all became operative on July 1, 1966. Unit 38 did not because Edgewood took an appeal.

Along with Unit 38, this left unapproved the racially unbalanced and controversial proposed Unit 16, which consisted of Braddock, North Braddock, Rankin, Turtle Creek, and East Pittsburgh. Since the surrounding municipalities with approved school districts were now operative, they were no longer available under any reorganization plans. This left the State few options with which to deal with Unit 16. The state chose to create new Unit 16, consisting of Braddock, North Braddock and Rankin (with a close to 40% black student population as of 1967), and new Unit 42, consisting of Turtle Creek and East Pittsburgh (with a 1.3% black student population as of 1967).

In 1968, the legislature passed Act 150 (Act of July 8, 1968, P.L. 299. No. 150, 24 P.S.§2400.1 et seq.) which superseded Act 299. This Act was simply a continuation of Act 299 and contained the same basic provisions as Act 299, except for modified appeals procedure. Act 150 further provided that all districts that had been merged under Act 299 would not be forced to merge to form larger districts. Therefore, with nothing new to work with, the State approved Unit 16, now called General Braddock Area School District, and Until 42, now known as Turtle Creek, as they had been proposed under Act 299. The only change of the County Board's plan that occurred under Act 150 was that the proposed Unit 38 (Edgewood, Braddock Hills and Swissvale) was split up into two smaller districts: Edgewood, with a student population of 928, 0% black, and Swissvale and Braddock Hills, now known as Swissvale, with a student population of 2,286, 10% black. This was done in spite of the statutory criteria for the size of districts.

These school districts went into effect on July 1, 1971 and this lawsuit was filed on June 9, 1971.

In an earlier opinion in this case, *Hoots v. Commonwealth of Pennsylvania*, 359 F.Supp. 807 (1973), this court made the following conclusion of law.

> 7. The natural, foreseeable and actual effect of combining Braddock, North Braddock and Rankin into a single school district was to perpetuate, exacerbate and maximize segregation of school pupils. Such conduct constituted an act of *de jure* discrimination in violation of the Fourteenth Amendment. (citations omitted).
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> 359 F.Supp. 807, at 823.

This constitutional violation was accomplished by the State and County Board through the reorganization process completed through Acts 561, 299, and 150. This court found specifically that the County and State Boards maximized racial segregation in the public schools by creating a school district composed of Braddock, North Braddock and Rankin. At the time the state approved such a district, no other combination of school districts in the area would have created a district with as large a percentage of non-white enrollment. (Finding of Fact No. 51, *Hoots, supra* at 819). Furthermore, the plan of organization adopted by the County and State Boards pursuant to Act 150 failed to meet many of the essential requirements of that Act and recognized educational standards. Act 150 was not met in several ways, the most obvious of which is the disregard of the 4,000 pupil population requirement (unless a smaller district was required) by combining Turtle Creek and East Pittsburgh with a population of only 1,898, by combining Braddock Hills and Swissvale with an enrollment of only 1,925, and by permitting Edgewood to stand alone with an enrollment of only 928. (Findings of Fact, No. 52. *Hoots, supra,* at 819).

The court found that the State and County Boards knew or should have known that they were creating a racially segregated school district. (Finding of Fact No. 50, *Hoots, supra,* at 818.) This court also found that the school districts in the vicinity of Braddock and Rankin continually sought to avoid being included in a school district with them due to the high concentration of blacks. (Finding of Fact No. 39, *Hoots, supra,* at 816.) At the time that General Braddock Area School District was approved by the State Board, alternatives to a school district composed of Braddock, North Braddock and Rankin were

available that would have been more consistent with Act 150. In view of the availability of these alternatives, the decision of the County and State Boards to create General Braddock Area School District was contrary to Act 150 and the standards set forth therein. (Findings of Fact 53 and 54, *Hoots, supra,* at 820).

On the basis of all the facts, this court concluded that by combining Braddock, North Braddock and Rankin into one school district, the County and State Boards created a racially segregated school district. (Finding of Fact No. 58, *Hoots, supra,* at 820). Furthermore, this court found that "the County and State Boards devised this plan of organization of administrative units which comprised Braddock, North Braddock and Rankin into one school district to satisfy the desires of as many of the surrounding municipalities as possible to be placed in a school district which did not include Braddock and Rankin." (Finding of Fact No. 59, *Hoots, supra,* at 821). Finally, the record contained no evidence showing that the school district boundaries established in the plan of organization of administrative units are rationally related to any legitimate purpose and the court found that those boundaries did not promote any valid state interest. (Finding of Fact No. 61, *Hoots, supra,* at 821).

On the basis of the above history of the reorganization of school district boundaries in the central eastern portion of Allegheny County pursuant to Acts 561, 299 and 150 and on the Findings of Fact of this court, particularly those laid out above, the court holds that a multidistrict remedy is appropriate and permissible in this case. General Braddock Area School District was created as a result of an interdistrict violation conducted by the state

during the reorganization process which included the redrawing of school district boundaries in that part of Allegheny County. *Milliken I* holds that "an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation." This case clearly falls within *Milliken I* guidelines for an interdistrict remedy, since racially discriminating acts of the state have been a substantial cause of interdistrict segregation.

The neighboring school districts that argue against an interdistrict remedy base their arguments on the ground that this court has made no finding that they had any involvement in the reorganization process which would enable the court to apply any remedy to them. They claim that since they are not guilty of any specific discriminatory actions they cannot be implicated in a multidistrict remedy.

A multidistrict remedy can be applied to surrounding districts that have not been found to have committed a constitutional violation themselves where their boundaries were drawn or redrawn during the course of the same violation which created the segregated school districts. *Morrilton School District No. 32 v. United States*, 606 F.2d 222 (8th Cir. 1979), *cert. denied* 444 U.S. 1071, 100 S.Ct. 1015, 62 L.Ed.2d 753 (1980); *Evans v. Buchanan*, 416 F.Supp. 328 (D.Del.1976), *aff'd* 555 F.2d 373 (3d Cir. 1977); *United States v. Board of School Commissioners of the City of Indianapolis*, 541 F.2d 1211 (7th Cir. 1976).

In the *Morrilton* case, the court found that the school district lines in Conway County followed a discriminatory pattern and ordered an interdistrict remedy. Some of the surrounding districts that would be effected by the remedy argued that since there was no evidence implicating them in a direct way, the court had no authority to order them

to remedy the state's wrong. The court found this argument to be without merit since the effects of the unconstitutional state action are felt in both districts. The court went on to quote *United States v. Board of School Commissioners of City of Indianapolis*, 573 F.2d 400, 410 (7th Cir. 1978), *cert. denied* 439 U.S. 824, 99 S.Ct. 93, 58 L. Ed.2d 116 (1978):

> [S]chool officials may not maintain that their districts should be excluded from any interdistrict remedy if they are found innocent of committing any constitutional violations because they should not be held responsible for the acts of the state legislators or other state subdivisions such as a local housing authority or a zoning board. The commands of the Fourteenth Amendment are directed at the state and cannot be avoided by a fragmentation of responsibility among various agents. *Cooper v. Aaron*, 358 U.S. 1, 15-17, 78 S.Ct. 1401, [1408-09] 3 L.Ed.2d 5 (1958). If the state has contributed to the separation of the races, it has the obligation to remedy the constitutional violations. That remedy may include school districts which are its instrumentalities and which were the product of the violation. 606 F.2d at 228-229.

The several opinions written in the Wilmington case, *Evans v. Buchanan, supra*, also support an interdistrict remedy in a case whose facts are similar to our own. The State of Delaware had set out a plan for reorganization and consolidation, which excluded the school district of Wilmington by a provision which limited the maximum pupil enrollment to 12,000. Since Wilmington already had an enrollment of over 15,000, they were not considered for consolidation with any of the surrounding school

districts. Since their non-white population was already at 66%, this had the effect of perpetuating and continuing segregation in the Wilmington schools.

The court in *Evans* found that the state had violated the constitution by acting in a manner which was a substantial and proximate cause of the existing disparity in racial enrollments in the districts of that area. They ordered a multidistrict remedy and the surrounding districts complained that they had committed no constitutional violation and should not be included in such a remedy. The court found this defense to be inadequate where the local boards are creatures of the state that had committed the violation.

> The fact that birth rates, or population shifts, or other factors also contributed to a degree will not relieve the State from its obligation to desegregate. The remedy for the violation must include school districts which are its instrumentalities and which were the product of one of the violations. The remedy for [illegible] acts of the State may be inconvenient, burdensome, and expensive to some of those instrumentalities, but neither inconvenience, burden nor expense can negate the duty of the Court to order effective relief when a not insubstantial violation has been shown.
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> *Evans, supra,* at 339-340.

The case presently before this court, as in the cases cited above, calls for an interdistrict remedy. The State and County Boards violated the constitution in the manner in which the school district lines were drawn and so all surrounding districts can be implicated in a remedy, despite their alleged lack of involvement in the process.

> Where the State has contributed to the separation of races by redrawing school lines, necessarily the districts on both sides of the lines are part of the violation itself, and exclusion of the suburban districts cannot be predicated on their own purported innocence when their present lines were drawn or redrawn in the course of a violation.
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> *Evans, supra,* at 340.

Neither are the surrounding districts innocent in the reorganization plan which created General Braddock. This court found that the school districts in the vicinity of Braddock and Rankin continually sought to avoid being included in a school district with them due to the high concentration of blacks. *Hoots, supra.* Finding of Fact No. 39.

Some of the school districts also claim a particular exclusive status, allegedly given them by the state, which would exclude them from being a part of any multidistrict remedy. Churchill, and East Allegheny were approved as school districts under Act 299. When that Act was superseded by Act 150, districts approved under Act 299 were exempted from Act 150. Churchill and East Allegheny claim they were granted "grandfather status" and therefore were not implicated in the creation of General Braddock which occurred under Act 150. Edgewood claims that because its boundaries preexisted all mergers, they were never involved in any redistricting which led to the creation of any segregated district.

This argument is without merit since the constitutional violation was not only committed under Act 150, but pursuant to the entire reorganization process that began with Act 561. Furthermore, the very elimination

from consideration for merger with those districts was itself a contributing factor to the creation of a segregated school district since all the districts with a lower black student population were now excluded from any plan, leaving General Braddock Area School District in an isolated position.

Churchill argues exclusion from a remedy even further in that they had begun their voluntary merger plans back in the 1950's before Act 561 and the state reorganization plan. It is irrelevant, however, when their current boundaries were first established. The actual vote to merge did not occur until after the passage of Act 561. The state at all times under Act 561 and Act 299 had expressly retained the power to force further merger with districts that had previously voluntarily merged. The fact that the state chose not to disrupt the new district of Churchill does not mean that the State could not have ordered them to merge again with Braddock Hills. Furthermore, it was the refusal to force such a merger, which was within the state's power, which contributed to the isolation of General Braddock.

Finally, the alleged "grandfather status" granted by Act 150 cannot eliminate any of the school districts from a future remedial plan of this court or the State. School districts are the creation and instrumentalities of the state and have no vested rights in their boundaries. In a case challenging the ability of the state to require merger under Act 299, the Pennsylvania Supreme Court held that the legislature reserves its powers to alter school laws in all contracts made by school districts. The court found that Act 299 could alter any mergers completed under prior acts since the Public School Code of 1949 did not

intend to create vested rights but merely authorized the formation of school districts which would exist until changed by future legislative direction.

> The continued ability to alter the organization of the school system throughout the Commonwealth is a prerequisite to the fulfillment of the Legislature's constitutional duty to provide for the maintenance of a thorough and efficient system of public schools.
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> The jointure agreement involved here was made pursuant to the authority given to school districts to enter into such agreements with the concomitant condition inherent in such legislative authority that actions taken pursuant thereto are subject to later change by the Legislature. As was pointed out in *Dodge v. Bd. of Education*, 302 U.S. 74, 79, 58 S.Ct. 98, 100 [82 L.Ed. 57] (1937), 'the presumption is that such a law is not intended to create private contractual or vested rights, but merely declares a policy to be pursued until the Legislature shall ordain otherwise.'
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> *Chartiers Valley Joint Schools v. Allegheny County Board*, 418 Pa. 520, 528-29, 211 A.2d 487 (1965).

School districts have no vested rights in their boundaries and they can be altered by the state whenever necessary. When the state has committed a constitutional violation in the use of its power, school district lines can be redrawn by the court to remedy that violation.

Edgewood also claims a sort of special status exempting it from any remedial plan since the Pennsylvania Su-

preme Court upheld its right to stand alone as a school district, despite its obvious non-compliance with the student population requirements. *Edgewood Borough School District Appeal,* 445 Pa. 343, 285 A.2d 880 (1971). That case, however, did not specifically address the propriety of or the motivation for letting Edgewood stand alone. It did not address the segregative effect of that action at all. That case was decided on a finding that the state had not abused its discretion in approving such a school district. The court refused to interfere with administrative decisions.

This court, however, must interfere with administrative decisions which are made by the state during the course of a constitutional violation.

On the basis of the foregoing this court holds that the following school districts may be included in any remedial plan to be considered by this court: Churchill, Turtle Creek, Swissvale, East Allegheny, Edgewood, and Gateway.

Two other school districts have been added as parties to consider the nature of the remedy, West Mifflin and Steel Valley. Both these school districts are located across the Monongahela River from the others in this area of eastern central Allegheny County. They were never considered in prior merger plans. The evidence shows that there is only one bridge carrying heavy traffic connecting these two school districts with the General Braddock area. This factor would make any consolidation with West Mifflin or Steel Valley highly impractical and they are, therefore, not to be included in any remedial plan before this court. Furthermore, the evidence suggests that as to Steel Valley, the present high degree of black school

attendance in that district would only spread the area of segregation, and in West Mifflin the black school population in the most adjacent school facilities shows the same pattern. Furthermore neither Steel Valley nor West Mifflin were involved in the jointure, consolidation or merger of the school districts which eventually led to the creation of the General Braddock Area School District.

ORDER

AND NOW, this 5th day of March, 1981, IT IS ORDERED THAT further consideration of remedial plans shall be governed by the above Opinion, and the motions to dismiss of the school districts of Churchill, Turtle Creek, Edgewood, East Allegheny and Gateway are DENIED. The motions to dismiss of the school districts of Steel Valley and West Mifflin are GRANTED.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DOROTHY HOOTS, et al

Plaintiffs

vs.

COMMONWEALTH OF PENNSYLVANIA et al.

Defendants

Civil Action No. 71-538

MEMORANDUM ORDER

After the Order of the Court of Appeals directing this court to proceed to a final determination of this matter within 90 days we began to proceed further with matters pending before us in August 1980. We proceeded to decide the second of the three part requirement imposed by the Court of Appeals at p. 17 of the slip opinion, the decision of *Milliken v. Bradley* issue of which schools may be included within an interdistrict remedy. On March 5, 1981, we issued our opinion in which we held that the Districts of Churchill, Edgewood, Swissvale, General Braddock Area, Turtle Creek, East Allegheny and Gateway may be legally included in an interdistrict remedial plan. We concluded that it was not feasible because of geography and other considerations to include the districts of Steel Valley and West Mifflin and granted the motions to dismiss as to those districts.

During this time we were also aware that the plaintiffs had engaged experts to prepare a report for the court proposing an interdistrict remedial plan. This came to our attention because of the presentation of certain motions tc compel discovery. The report and recommendation of plaintiffs' experts was filed in this court on March 26, 1981, and came into the hands of this court on Saturday, March 28, 1981, and was immediately read. On Monday, March 30, 1981 we ordered a conference of all counsel on Wednesday, April 1, 1981, to consider pending matters and determine a course of action. We heard two hours of argument and objections, suggestions and objections, proposals and objections. This Memorandum order is made on consideration of all matters raised.

On June 6, 1980, General Braddock filed an "upgrade plan." This was a very sketchy proposal to improve the quality of its schools to attract non-minority students back to the General Braddock Area schools to improve the racial balance. No testimony on this plan was taken in the extensive hearings during the summer of 1980 which were concentrated on the "tuition plan" originally urged on us by plaintiffs in their application for Mandamus of April 16, 1979, and which we ordered the Commonwealth to prepare on May 17, 1979.

On March 26, 1981, there was also filed by the General Braddock Area School District a fleshed-out version of the "upgrade plan" submitted by its experts, the Donald M. Carroll Agency. Several of the parties defendant strongly insist that we hear testimony on the Carroll plan, and also request that the court consider a further development of the plan to be submitted. We reject the Carroll plan for further consideration. The plan is intradistrict; it does not face the issue of desegregation. Only as an

admitted after-thought was there added a provision for interdistrict visits one half day each week.

We are ready for the consideration of the remedial plan proposed by plaintiffs. We are thoroughly familiar with all of the districts to be involved, we have considered other plans involving permutations and combinations of neighboring districts to the point that little can be added.

Having dismissed West Mifflin and Steel Valley Districts, we have remaining before us seven (7) districts as parties added for the purpose of a remedy.

The plaintiffs now propose a five district remedy, composed of five districts most fully covered in prior hearings. Plaintiffs do not propose the inclusion of East Allegheny and Gateway for many reasons of efficiency, area, distances and facilities. To the court's suggestion that East Allegheny and Gateway be dropped as defendants there was only partial and moderate opposition. They will remain as parties until we have concluded the further hearings provided herein.

From all of the hearings held we are of the opinion that only an interdistrict remedy is feasible here, and we will proceed to determine the districts to be included on the basis of the HGH Associates Plan of Consolidation. We are also of the opinion that only a single new district be formed from the consolidation because of the many difficulties presented by plans of consolidation into multiple new districts on which we have heard testimony in prior hearing.

Finally, after full hearings thereon, we are satisfied that the tuition plan prepared by the Commonwealth or any amendments or modifications thereof, cannot achieve effective desegregation, and the plan is therefore rejected.

NOW, THEREFORE, IT IS ORDERED that hearings on the remedy to be ordered shall be held beginning at *9:30 a.m. Monday, April 20, 1981.* The hearings shall be held solely for the purpose of determining the districts to be consolidated for the purpose of remedying the constitutional violations found to have been imposed on the plaintiffs here. The districts to be considered will be limited to General Braddock Area, Churchill Area, Swissvale Area, Edgewood, Turtle Creek Area, East Allegheny and Gateway.

No evidence or testimony will be taken as to any prior plan presented to this court.

The testimony shall be limited to the geographical area of a new school district proposed to be formed by the consolidation or merger of the above districts.

No evidence or testimony shall be presented on any aspect of administration of the newly created district, including matters of pupil assignment, staff assignment, utilization of facilities, transportation or any matter of implementation.

Due to the substantial evidence already presented and in view of the requirement of immediate relief, the hearings shall be limited as follows:

Monday, April 20, 1981. Presentation by Plaintiffs of expert testimony in support of their submitted plan.

Tuesday, April 21, 1981. Cross-examination of Plaintiffs' expert witnesses and presentation of expert testimony of Defendants.

Wednesday, April 22, 1981. Presentation of Defendants' expert testimony.

Cross-examination of Plaintiffs' expert shall be limited to three of defendants' counsel, chosen by agreement among them. Defendants shall be limited to the presentation of one witness for each party defendant.

At the close of the hearings on *Wednesday, April 22, 1981,* the court shall proceed to an order establishing the school district designate to effect the remedy.

SO ORDERED this *6th day of April, 1981.*

(s) Gerald J. Weber
Gerald J. Weber
Chief United States District Judge

cc: All counsel

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DOROTHY HOOTS, individually and as mother of her children, JANELLE HOOTS and JAMIE HOOTS * * * [et al.]

v.

COMMONWEALTH OF PENNSYLVANIA: * * * [et al.]

Civil Action No. 71-538

OPINION

WEBER, C.J., April 28, 1981

We begin bearing in mind a profound observation of Henry Louis Mencken that every difficult problem always has a simple solution and that solution is always wrong. There is no simple solution here and we have searched all of those offered. Any solution is involved with high emotional reactions to the extent that calm discussion is rarely possible in the presence of as many as twelve sets of counsel, mostly representing diverse and possibly irreconcilable interests.

The history of this case has been recited too often in the opinions of this court and reviewing courts to justify any repetition here. It has not always been discussed accurately. The description of the plaintiffs as parents of

children in the General Braddock Area School District, of the plight of the Hoots, Knight and Smith children was pure fancy. Mrs. Hoots has not been a resident of this District since before the very first hearings; nine of Mrs. Knight's children graduated from Braddock High School before the reorganization, and Mrs. Knight has not resided in the district since 1977. Mrs. Smith has remained a resident of General Braddock Area School District and an employee of plaintiffs' counsel, but her children are enrolled in parochial schools. Because of these facts, plaintiffs have moved for the substitution of new parties plaintiff, although the caption still bears the Hoots name for identifying purposes.

Nor is the picture of the black children of General Braddock sitting on the steps of the courthouse waiting for justice accurate. It would be more accurate to state that they are part of a group, both black and white, that are picketing the court to stop any plan that involves the closing of Scott High School. They have so testified, they have filed petitions with the court, and have indulged in a letter writing campaign. This feeling was particularly strong when Scott High School became the State Champion in the basketball competition.

Nevertheless, there is a clear violation of constitutional rights, and there are now proper parties plaintiff before the court; regardless of the size of the group they have a right to be remedied.

Following our rejection of Plan A in 1977 for the reasons set forth in the opinion and the appeal therefrom, this court proceeded on the motion of the plaintiffs to order the Commonwealth to prepare a tuition voucher plan. Additional neighboring school districts were added

as defendants for the purpose of devising a remedy. The Commonwealth required more time than was originally allowed, and finally filed its detailed tuition plan on May 15, 1980. The school districts involved filed objections by June 16, 1980, and hearings began on July 14, 1980 and continued until July 30, 1980. In the midst of the hearings, which the court had limited solely to the merits of the tuition plan, plaintiffs took an abrupt change of position and opposed the plan, and presented testimony in opposition. In the midst of the hearings plaintiffs presented a motion calling for the immediate rejection of the tuition plan and for an injunctive order requiring the Commonwealth to prepare a merger or consolidation plan. This was denied because the court had not yet made any decision on the requested tuition plan and an immediate appeal by plaintiffs followed.

In the meantime, two additional plans were submitted by parties, an upgrade plan by General Braddock, and a metropolitan merger plan by the Commonwealth, both of which were solely preliminary proposals without a detailed workup. The Commonwealth later withdrew its metropolitan plan from consideration. No plan that we had considered up to that time achieved a consensus of approval by the parties; the tuition plan was the least strenuously opposed because it left the individual administrative units intact, including General Braddock itself, and because it proposed distributing the General Braddock students over a very wide area and among many districts. Nevertheless, it consigned General Braddock students to a second class status, that of tolerated guests in a foreign school district, and it deprived their parents of a voice in the control of the school district that was educating their children.

In August 1980 we were prepared to continue hearings on other plans but all of this was interrupted by the pendency of the appeal.

Upon the return of the mandate on January 27, 1981, we immediately convened the counsel for consideration of further action. We rejected the upgrade plan which did essentially nothing to achieve desegregation and also we determined the *Milliken v. Bradley* issue as it applied to certain of the school districts joined as defendants for the purpose of relief. We dismissed two of the previously joined school districts because their further involvement was considered unnecessary. We determined that the only appropriate remedy in this situation must be a multi-district merger of several school districts into a single district. The plaintiffs' counsel informed us through certain motions for discovery, that they had engaged professional expert services and would submit a plan. On March 24, 1981, the plaintiffs for the first time proposed their own remedy. This called for a plan of consolidation of five school districts. We set the matter down for hearings on April 20, 1981.

We strictly limited this hearing to the question of the geographical boundaries of the proposed district and the identity of the districts to be included. At this point seven school districts remained as defendants for the purpose of constructing a remedy. We limited the plaintiffs to one day of testimony limited solely to this issue, and gave all defendants two days for cross-examination and presentation of direct testimony. The defendants were allowed to divide their time among themselves but did not choose to do so. Only four districts desired to present any direct testimony and for the most part only these districts undertook cross-examination.

General Braddock Area School District announced at the opening of the hearing that they joined with the plaintiffs' motion to approve the five district plan.

We barred all testimony as to the administration of the plan, its implementation, pupil assignments, the further use of discontinuance of school facilities, both because we believed that the essential primary question for our consideration was the make-up of the new district, and also because we believe that the organization and planning of the educational system in the New School District was a matter for determination by the Pennsylvania Department of Public Instruction, the Allegheny County Intermediate Unit, and the representations of the New School District.

We therefore proceed to our determination of the New School District.

THE COMPOSITION OF THE NEW DISTRICT.

The Court finds that a New School District composed of the present school districts of Churchill, Edgewood, Swissvale, General Braddock, and Turtle Creek would achieve desegregation of the General Braddock Area School District and would achieve the highest beneficial results over and above the results of any other plan submitted to this Court by any party during the whole period of this litigation. The Court bases this conclusion on the following evidence developed in the record:

(1) It would produce a district with a school population 83% white and 17% minority (mostly black), within a general range of recognized desegregation guidelines and comparable to the population distribution over a wide area of Allegheny County.

(2) The pattern of desegregation established is likely to remain stable.

(3) All of the districts included are contiguous to each other, three of the districts border General Braddock, and the remaining district, Edgewood, borders one and almost borders another.

(4) The area of the New District is moderate in size (13.5 sq. miles) as compared to the average size of Allegheny County Districts (15 sq. miles).

(5) The district is roughly circular in configuration, lending itself to increased administrative and transportation efficiencies.

(6) All points in the district are within 2.5 miles radius of its center, and the greatest diameter from one edge of the district to the other is less than 5 miles.

(7) Student population density of the New District would be 821 per square mile, a high density compared to the 275 per square mile density of the average Allegheny County School District (excluding the City of Pittsburgh).

(8) Student population of the New District would be 9,132 in 1981, which exceeds the minimum of 4,000 students mandated for merged districts under the statutory and regulatory guidelines of the Commonwealth of Pennsylvania.

(9) Student enrollment in all of the merged districts has been declining at a rate exceeding 35% in the past ten years, and from the student population figures in grades from kindergarten to 12th grade may be expected to decline at a comparable rate in the next eight years, all of which indicates a need for

consolidation to achieve educational efficiency and economy.

(10) All of the merged districts have excess capacity, in most cases substantial, at all instructional levels, making the excess capacity for the New District 40%. This will increase as the student population continues to decline. This excess capacity could be greatly reduced by the merging of these districts, the merging of student population, the discontinuance of old buildings requiring extensive repairs, allowing for a better organized comprehensive educational program without additional cost, and the possibility of very substantial savings in costs, as well as achieving desegregation.

(11) The New District will be strongly interconnected by available transportation arteries, and the relatively short distances between most parts of the district will minimize the time and mileage involved in any additional transportation needed.

(12) The existing transportation facilities of the merged districts, should be adequate to serve the transportation needs of the New District.

(13) Inasmuch as a substantial number of public school students in the present district are bussed, and because of the limited distances in the New District, it is not contemplated that any large increase in the total mileage or number of students transported will result from the consolidation.

(14) The proposed New District will be financially viable, having a higher tax base per student than the state average, and higher than some of the present districts included.

DISTRICTS EXCLUDED.

We have previously dismissed from consideration of inclusion in the remedial district the districts of Steel Valley and West Mifflin because the distances involved are too great and the transportation bottleneck of a single highway bridge across the Monongahela River is too severe. Furthermore, because Steel Valley's student population shows a high ratio of minority students, its inclusion would not advance the desegregation of General Braddock. The size and distances of the West Mifflin District, the distant location of some of its facilities, and the high percentage of minority student population in the schools nearest the New District do not make it amenable in a district designed to achieve desegregation of the General Braddock district.

At the time of the April 1981 hearings, Gateway district and East Allegheny district remained as parties. They were not included in the Motion of Plaintiffs to create a five (5) district consolidation but their motions for dismissal were opposed. At the hearing, testimony was offered as to the reasons for their exclusion and no evidence supporting reasons for their inclusion was presented. In general, neither of these districts should be included. Their large geographical area, the distances of their facilities from the facilities in the New District, and the acute transportation bottlenecks between these districts and the New District made their inclusion highly undesirable. At the close of the hearings their motions for dismissal were granted.

INDIVIDUAL DISTRICTS TO BE INCLUDED.

This left five districts to be considered. The reasons for the inclusion of each individual district in the New District are:

(1) *General Braddock:* This district must be included in any remedy because its intentional creation as a racially identifiable black school district constituted the constitutional violation found in this case. Its 63% black student population in a larger area where the surrounding districts vary from less than 1% to a maximum of 13% black makes it mandatory for inclusion. It has continued serious financial problems that makes its future as a viable district uncertain.

(2) *Turtle Creek* is included because it is contiguous to the General Braddock area, and also contiguous to Churchill which is also included in the New District. It is racially identifiable as a white school district (98%), it is small in area (1.37 miles), and has a high density of pupils per square mile (920), it has significant unused building capacity, particularly in its high school, and has experienced dropping enrollment and faces a continuing decline. Its present 1,200 student population in the face of a state standard of 4,000 students required for an adequate educational program renders its future as a viable independent school district cloudy. It has adequate transportational connection with the rest of the New District. It has close community business and occupation ties with the General Braddock Area District and also with the Churchill Area. It faces the same economic problems as the General Braddock district.

(3) *Churchill* is included because it is contiguous to General Braddock, as well as contiguous to Turtle Creek, Swissvale, and almost if not actually contiguous to Edgewood. It is identifiable as a 99.2% white school district. It has excess capacity in its facilities and a declining enrollment. Its geographical position puts it in the heart of the New District, and its exclusion from the compact

formation of the New District would make all of the considerations of geographical contiguity and compactness of the New District meaningless. Its economic strength would add financial stability to the new district.

(4) *Swissvale* is included because it is contiguous to the General Braddock Area District, as well as contiguous to Churchill and Edgewood in the New District, it is small in geographic area but with a high density of pupils per square mile (771), it is small in student population (1,757), below the minimum state standard requiring consolidation, and its student population. It has many connecting arteries of transportation with the rest of the New District. Its exclusion would result in a large vacuum between the other areas of the New District because of its central position in the configuration and its nexus of transportation arteries connecting other parties of the New District.

(5) *Edgewood* is included because it is identifiable as a white school district (98%) in a general area the composition of which is 17% black, and where the adjoining district, Swissvale is 13% black; its very small geographic size, (1/2 sq. mile), its high student population density (920 pupils per square mile), and its very low student population (731), which has declined and will continue to decline, and its substantial underutilization of facilities. It is close to many other schools in the New District, and has ready transportation access to the other areas included in the consolidation. We recognize that Edgewood was granted an exemption from the 4,000 minimum student population requirement after much litigation, but its student population has continued to decline. It is highly commendable that this district has been able to attract 100 tuition students from Pittsburgh and other

districts to help fill the underutilized facilities, and that it is able to receive $1,000 or $1,200 per tuition student in this process, bringing substantial additional revenue to the district. However, it is possible for Edgewood to educate these additional students at a figure much less than the average cost of education per pupil because of the economic law of marginal cost, no increase of operating costs is involved in the utilization of the empty classroom seats. However, in so doing Edgewood has entered the business of private education and using the profit therefrom to help finance the education of its own residents. This is contrary to the Commonwealth's school district reorganization policy. Edgewood's inclusion rounds out the compact shape of the district, and adds financial stability to the New District.

All of these districts are properly subject to inclusion in the remedy of desegregation of the General Braddock Area School District because of their involvement in the violations which led to the creation of the General Braddock Area School District as set forth in our Opinion of March 5, 1981.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-538

DOROTHY HOOTS, et al.

Plaintiffs

vs.

COMMONWEALTH OF PENNSYLVANIA, et al

Defendants

ORDER

AND NOW, this 28th day of April, 1981, it is hereby ORDERED that the public schools in the districts named herein in central eastern Allegheny County, Pennsylvania, shall be desegregated, effective in the beginning of the first semester of the school year, 1981-1982 in accordance with the following terms and conditions:

(1) As of the date of this Order the following school districts in Allegheny County, Pennsylvania, shall cease to exist as separate school districts and shall be consolidated and merged into a single unitary school district, hereinafter referred to as the "New School District";

Churchill Area School District
Edgewood School District
General Braddock Area School District
Swissvale Area School District
Turtle Creek Area School District.

(2) The New School District created by this Order shall constitute and be deemed established as a school

district and shall belong to the class to which it is entitled as provided by law.

(3) All school directors of the component school districts forming The New School District shall serve out the terms of office for which they were elected. No vacancies occurring in such positions after the date of establishment shall be filled.

(4) On or before the 15th day of May, 1981, such incumbent school directors of the component school districts shall be called into convention by the County Superintendent of Schools and shall select by majority vote an Interim Operating Committee composed of nine (9) incumbent school directors. In selecting the Interim Operating Committee the incumbent school directors shall select no more than two (2) incumbent school directors from any single former district. The decision of the convention in selecting the Interim Operating Committee shall be final. Three (3) of the members of the Interim Operating Committee shall be selected for a term expiring on the first Monday of December, 1981, three (3) for a term expiring on the first Monday of December, 1983, and three (3) for a term expiring on the first Monday of December, 1985. In the event that an incumbent director is selected for a term on the Interim Operating Committee which would expire later than the term for which he was elected as a School Director, he shall serve only until the end of his term for which he was elected as School Director. At the municipal elections held in November, 1981, and at each municipal election thereafter School Directors shall be elected for six (6) year terms and shall take the place of the appointed members of the Board of School Directors of the newly established School District as their terms expire. The members of the Interim

Operating Committee shall become and shall serve as the Board of School Directors of the School District on and after the date of its establishment as herein provided.

(5) The incumbent School Directors of the component former school district not selected for membership on the Interim Operating Committee shall serve in an advisory capacity to the Interim Operating Committee and to the Board of School Directors of the newly established School District. Such incumbent School Directors may attend meetings and participate in discussion of the Interim Operating Committee and Board of School Directors but shall have no vote.

(6) The Interim Operating Committee of the New School District shall develop a plan to divide the New School District into nine (9) regions. The boundaries of the regions shall be fixed and established in such manner that the population of each region shall be as nearly equal as possible and shall be compatible with the boundaries of election districts. Such plan for the division of the school districts shall be submitted for approval to the Court of Common Pleas of Allegheny County. If approved by such court the Clerk thereof shall immediately certify the regional boundaries contained therein to the County Board of Elections. One (1) School Director who resides in each region shall be elected or appointed by and from each region and at all times each region shall be represented by a Director elected or appointed as herein provided from that region.

(7) The Interim Operating Committee shall have the power and its duties shall be to meet, prepare and adopt a budget, levy and assess taxes and perform all acts and functions necessary to enable the New School District

to function properly from and after the date of organization of the Interim Operating Committee.

(8) The Interim Operating Committee shall have the power to fill vacancies should a vacancy in its membership arise due to death, resignation or otherwise provided, however, that the vacancy shall first be filled by the selection of an incumbent School Director elected by one of the component former school districts.

(9) The Interim Operating Committee shall have the power and its duties shall be to propose a name for the New School District. The name proposed shall be reported to the Department of Public Instruction which shall review the proposed name and approve it if it is not a duplication of a name previously approved by the Department of Public Instruction. When it approves a name, the Department of Public Instruction shall issue a certificate stating that the approved name has been registered as the official designation of the School District.

(10) The component school districts shall continue under the governance of their respective directors until June 30, 1981.

(11) All operating obligations of any component former school district contracted for current operating expenses until June 30, 1981 shall continue to be an obligation of the taxable property within such former component school district.

(12) On or before June 1, 1981, the representatives of the Pennsylvania Department of Education and the Allegheny County Intermediate Unit shall convene a meeting of the Interim Operating Committee to:

(i) assume the governance of the New School District;

(ii) organize the consolidation of the five former school districts;

(iii) establish the administration and provide for the financing of the New School District, and

(iv) take all actions necessary to prepare for the implementation of a plan of desegregation as set forth herein.

(13) The Secretary of the Pennsylvania Department of Public Instruction, or his designate, and the Allegheny County Intermediate Unit shall meet with the Interim Operating Committee of the New School District on or before the 15th day of June, 1981, to design a plan of desegregation and provide for its implementation with the beginning of the 1981-82 school year, and shall continue such planning until such plan is fully operational within the New School District.

(14) The plan of desegregation shall be designed and implemented in such a manner as to achieve and satisfy the greatest possible degree of actual desegregation, including desegregation of student enrollment, attendance, administration, faculty, staff, facilities, programs and activities. The plan shall be equitable in every respect and designed to achieve an equal sharing of the burden of desegregation between black and white students, parents and communities. The plan shall be designed not only to eliminate the effects of past discrimination but to the greatest extent possible, to prevent like discrimination in the future years.

(15) All of the provisions of the act of March 10, 1949 (P.L. 30), known as the "Public School Code of 1949", relating to school districts shall apply to this New School District.

(16) It shall be the primary responsibility of the Secretary of the Pennsylvania Department of Public Instruction, or his designate, to assure that a plan of desegregation is designed and implemented in accordance with the timetable set forth herein. In order to execute this responsibility the Secretary of the Pennsylvania Department of Public Instruction, or his designate, may take any action, consistent with this order and opinion, which it deems necessary to achieve the objectives set forth in this order.

(17) This court shall retain continuing jurisdiction over this action to oversee the planning and implementation of a program of desegregation; to enforce this order; and to enter such other orders as the court deems just and proper to effect a remedy.

(s) Gerald J. Weber
Gerald J. Weber
Chief United States District Judge

UNITED STATES COURT OF APPEALS

For the Third Circuit

Nos. 81-1691, 81-1692, 81-1693, 81-1694, 81-1695, 81-1790, 81-1986, 81-1987 and 81-1988

DOROTHY HOOTS, individually and as mother of her children, JANELLE HOOTS and JAMIE HOOTS; * * * [et al.]

v.

COMMONWEALTH OF PENNSYLVANIA: * * * [et al.]

(Opinion Filed February 1, 1982)

OPINION OF THE COURT

HUNTER, *Circuit Judge.*

1. This decision is the ninth chapter in the history of this decade-old school desegregation case.[1] The plaintiff class consists of parents of children who attend public schools in the General Braddock Area School District ("GBASD") in Allegheny County, Pennsylvania. Defend-

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[1] The other decisions are: Hoots v. Commonwealth of Pennsylvania, 334 F. Supp. 820 (W.D. Pa. 1972) (*"Hoots I"*); Hoots v. Commonwealth of Pennsylvania, 359 F. Supp. 807 (W.D. Pa. 1973) (*"Hoots II"*); Hoots v. Commonwealth of Pennsylvania, 495 F.2d 1095 (3d Cir.), *cert. denied*, 419 U.S. 884 (1974) (*"Hoots III"*); Hoots v. Commonwealth of Pennsylvania, 587 F.2d 1340 (3d Cir. 1978) (*"Hoots IV"*); Hoots v. Commonwealth of Penn-

ants are the Commonwealth of Pennsylvania, the Pennsylvania State Board of Education (the "State Board"), the Allegheny Board of Education (the "County Board," later succeeded by the "Intermediate Unit"), and several of the Boards' officers. Plaintiffs filed a complaint on June 9, 1971, alleging that the consolidation of various school districts in Allegheny County by the Commonwealth of Pennsylvania, acting through the State and County Boards, had resulted in the creation of racially segregated schools. The district court, in *Hoots II*, held that the creation of GBASD by the State and County Boards was "an act of *de jure* discrimination in violation of the Fourteenth Amendment." *Hoots II*, 359 F. Supp. at 823. Various plans were considered by the district court as possible remedies for the continuing violations of plaintiffs' constitutional rights. In March 1981, the court decided which of numerous school districts could be included in any multidistrict remedy under the guidelines of *Milliken v. Bradley*, 418 U.S. 717 (1974). *Hoots VI*, 510 F. Supp. at 619. In April 1981, the district court approved the consolidation plan presently under appeal.[2]

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sylvania, 639 F.2d 972 (3d Cir. 1981) *("Hoots V")*; Hoots v. Commonwealth of Pennsylvania, 510 F. Supp. 615 (W.D. Pa. 1981) *("Hoots VI")*; Hoots v. Commonwealth of Pennsylvania, (W.D. Pa. 71-258, April 16, 1981) *("Hoots VII")*; Hoots v. Commonwealth of Pennsylvania, (W.D. Pa. 71-258, April 28, 1981) *("Hoots VIII")*.

In addition, we have denied plaintiffs' applications for writ of mandamus on two occasions. Hoots v. Weber, No. 79-1474 (3d Cir. May 2, 1979); Hoots v. Weber, No. 80-2124 (3d Cir. Sept. 9, 1980).

[2] Applications for a stay of *Hoots VIII* have been denied by the district court, this court and the United States Supreme Court (June 29, 1981). *See* Appendix at 3180a, 3181a-3186a.

2. Defendants' present appeal is based on two contentions. First, they argue that *Hoots II*, in which the district court found a constitutional violation, was incorrectly decided, in that the district court did not find *intentional* or *purposeful* segregative acts on the part of state officials. Second, defendants contend that the district court erred in fashioning the multidistrict remedy that it ultimately chose.

3. We find defendants' arguments unpersuasive and we affirm the rulings of the district court.

I. FACTS AND PROCEDURAL HISTORY

4. The facts of this case, especially those which lead to the initial filing of the complaint in this action, are ably and extensively set forth in the district court's May 1973 opinion. *See Hoots II*, 359 F. Supp. 807. The procedural posture of the case has been recited on numerous occasions by this court: *Hoots IV*, 587 F.2d 1340; *Hoots V*, 639 F.2d 972. Here, we will summarize those accounts and then supplement them with a recital of subsequent events leading to the instant appeal.

5. During the 1960's, the Commonwealth of Pennsylvania on three occasions enacted legislation to reorganize the school districts in Pennsylvania's public school system. The Act of September 12, 1961, P.L. 1283, No. 561, 24 P.S. §281 *et seq.* ("Act 561"), directed each county board of school directors to prepare a plan of organization of school districts for the county for review by the State Board of Education. This Act was superseded, although not substantively altered, by the Act of August 8, 1963, P.L. 564, No. 299, 24 P.S. §2-290 *et seq.* ("Act 299"), and the Act of July 8, 1968, P.L. 299, No. 150, 24 P.S. §2400.1 *et seq.* ("Act 150"). Act 299 in-

structed the county boards to prepare on or before July 1, 1964 a plan of organization of school districts for the county and directed the State Board of Education to review organization plans prepared by the county boards and to approve such plans as it deemed wise and in the best interest of the educational system of Pennsylvania.

6. Acts 299 and 150 provided for the plans of organization of school districts to conform to standards which were to be prepared by the State Board. In preparing these standards, the State Board was instructed to take into account: topography, pupil population, community characteristics, transportation of pupils, use of existing buildings, existing administrative units, potential population changes and the capability of providing a comprehensive plan of education. 24 P.S. §§2400.1, 2400.2; 24 P.S. §§2-291, 2-292. Both Acts also stipulated that no school district should, as a general rule have a pupil population of fewer than 4,000 students.[3]

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[3] Pursuant to these provisions, the State Board adopted Standards for Approval of Administrative Units. These standards provided, *inter alia*, that:

(a) An administrative unit shall make available an educational program and educational opportunities to meet the varying needs, aptitudes, abilities, and interests of individuals residing in the administrative unit.

(b) Consideration should be given to whether a geographic area has developed the characteristics of a community. Community, as used here, includes one or more municipalities and the surrounding territory from where people came for business, social, recreational, fraternal or similar reasons. Neither race or religion shall be a factor in determining administrative unit boundaries and differences in the social and economic level of the population shall not be a basis to determine these boundaries.

7. The State and County Boards, pursuant to these statutes, established GBASD (63% black) on July 1, 1971, in the central eastern area of Allegheny County, east of Pittsburgh and north of the Monongahela River. The boards also created the predominately or all-white school districts of Turtle Creek (98.1% white), Swissvale (87.3% white), and Churchill (99.2% white), which bor-

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A letter from the Superintendent of the Department of Public Instruction advised the County Boards, including the Allegheny County Board, that the intent of the language of the last sentence of the above paragraph was to prevent *de jure* segregation through the fixing of school district boundaries and that the language was not to be construed to permit *de facto* segregation on the basis of race, religion or national origin which is by law prohibited.

(c) An administrative unit shall utilize existing buildings to the maximum extent practical avoiding unnecessary new construction where possible.

(d) Pupil population changes may be considered in the planning of administrative units where the changes are supported by reliable studies of area development showing past pupil population trends and future projections based on recognized statistical methods.

(e) Consideration shall be given to the capability of providing a comprehensive program of education which shall mean the ability to educate and train each child within his capacity to the extent demanded by the immediate requirements of his growth and his relationship to the strengthening of this Commonwealth and nation, and shall include, but not be limited to, wealth per pupil, qualifications of professional staff, enrollment and diversification of curriculum.

Hoots II, 359 F. Supp. at 812-13 (exhibit citations omitted). We note that the parties throughout their briefs and in oral argument have referred to the Standards as the "Section (e) issue." Paragraph 7(e) is identical to the verbatim quotation of paragraph 3-(b) above. *See* Appendix 319a-20a.

der on GBASD, and the Edgewood School District (97.-8% white), which is situated within approximately one mile of the GBASD. Appendix at 3233a. GBASD served the area consisting of the geographic limits of the Boroughs of Braddock, North Braddock and Rankin. Braddock, North Braddock and Rankin are economically depressed, declining communities. The residents of these municipalities are poor and less educated than those of the other school districts in question. The recreational and shopping facilities within these communities have been rapidly declining and becoming increasingly older in average age. The boroughs of Braddock, North Braddock and Rankin have no characteristics that will attract or retain persons who have the financial means and opportunity to live elsewhere. Finally, the populations of these three communities are becoming increasingly nonwhite at an accelerated pace. *Hoots II*, 359 F. Supp. at 814 (Findings of Facts 20-27).

8. Plaintiffs filed this action on June 9, 1971. In December 1971, the district court denied defendants' motion to dismiss the complaint for failure to state a cause of action, concluding that "allegations of deliberate creation of racially segregated school districts state a cause of action." *Hoots I*, 334 F. Supp. 820, 822.

9. The district court also rejected motions by defendants seeking to join involuntarily as defendants the five school districts discussed in the complaint. However, the court stated that it would permit the school districts to intervene voluntarily in the action if they so desired. *Hoots I*, 334 F. Supp. at 823. The school districts did not do so. After the district court "instructed [the Commonwealth] to give notice" of the suit to those school districts, and after the Attorney General of Pennsylvania

wrote the five districts urging them "to intervene in this action immediately," the districts informed the court that they had "no interest in being" in the lawsuit, and were "deliberately not intervening." *See Hoots II*, 359 F. Supp. at 821; *Hoots III*, 495 F.2d at 1097; Appendix at 56a-61a, 614a-618a, 2712a, 3383a, 3389a.

10. On May 15, 1973, the district court held that the State and County Boards' creation of the identifiably black GBASD and the identifiably white Churchill, Edgewood, Swissvale and Turtle Creek districts "constituted an act of *de jure* discrimination in violation of the Fourteenth Amendment." *Hoots II*, 359 F. Supp. at 823. The court ordered the defendants to submit promptly a desegregation plan, to take effect as early as possible, to achieve the greatest possible degree of desegregation within the public schools of the central eastern area of Allegheny County. *Hoots II*, 359 F. Supp. at 824-25. Specifically, the court ordered defendants to "prepare and submit to this Court within 45 days from the date of this Order a comprehensive plan of school desegregation" which "shall alter the boundary lines of the General Braddock Area School District and as appropriate of adjacent and/or nearby school districts." *Id.* at 824. Defendants did not appeal.

11. In April 1974, after the district court's violation finding in *Hoots II*, Churchill, Edgewood, Swissvale and Turtle Creek petitioned to intervene. The district court granted these petitions insofar as they sought prospective intervention, but denied them insofar as they sought retroactive intervention. Churchill and Turtle Creek appealed this partial denial of their motions. We affirmed the district court, holding that the retroactive intervention peti-

tions were untimely. *See Hoots III*, 495 F.2d 1095, 1097 (3d Cir.), *cert. denied*, 419 U.S. 884 (1974).

12. The defendants did not submit a comprehensive plan of school desegregation within 15 days. In the following years, after granting defendants numerous extensions of time within which to develop effective desegregation plans, the district court found it necessary to reject as inadequate six plans[4] submitted by the Commonwealth and the defendant districts. Five of the plans were interdistrict in nature, and four involved the consolidation of some or all of the school districts presently involved in this case into one or more new school districts. *See Hoots IV*, 587 F.2d at 1344-46; *Hoots V*, 639 F.2d at 975-77; *id.* at 984-86 (Higginbotham, J. concurring).

13. Plaintiffs appealed twice during the 1973-1980 period. On both occasions they asked this court for a remedial order ending school segregation in central eastern Allegheny County. We dismissed plaintiffs' first appeal in 1978 but we expressed "confiden[ce] that . . . an appropriate final order" would "be entered by year end" 1978. *Hoots IV*, 587 F.2d at 1351. In August 1980, after the district court denied plaintiffs' motion for injunctive relief for the second school year since 1978, plaintiffs appealed again. On January 26, 1981, we stated:

> We believe it to be essential that the district court afford relief to [plaintiffs] that will be effective in the fall of 1981. *Under no circumstances should a new school year begin in the fall of 1981 without an acceptable remedial plan in place.*

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[4] Plans 22W, A, B and Z, the Tuition Plan and the Upgrade Plan.

Accordingly, we order the district court to expedite its consideration of this case so that within ninety days of the issuance of the mandate of this court it shall:

1) complete all hearings and necessary proceedings on the merits of the competing remedial plans for the desegregation of GBASD;

2) decide the *Milliken v. Bradley* issue of which school districts may be included within an interdistrict remedy; and

3) enter an appropriate final order granting appellants the relief to which they are entitled under the district court's order of May 15, 1973, such relief to be effective and implemented by the beginning of the first semester of the school year in the fall of 1981.

Hoots V, 639 F.2d at 980-81 (footnotes omitted) (emphasis added).

14. On March 5, 1981, the district court entered an opinion and order reaffirming its 1973 interdistrict violation finding. It concluded that the violation involved seven central eastern area school districts (including the five districts involved in this appeal), and determined that a multidistrict remedy involving some or all of those districts was appropriate. *Hoots VI*, 510 F. Supp. at 619.

15. On April 6, 1981, the district court rejected two remedial plans filed by defendants—the Upgrade Plan and the Tuition Plan—because neither could "achieve effective desegregation." *Hoots VII* at 2, 4; Appendix at 1379a, 1381a. The court concluded that "only an interdistrict remedy is feasible here, and . . . that only a single new district be formed from the consolidation because of the

many difficulties presented by plans of consolidation into multiple new districts on which we have heard testimony in prior hearings." *Hoots VII* at 3; Appendix at 1380a. Accordingly, the court ordered hearings on the remedy to be held on April 20, 1981, "solely for the purpose of remedying the constitutional violations found to have been imposed on the plaintiffs here." *Hoots VII* at 4; Appendix at 1381a.

16. On April 28, 1981, the district court entered its first remedial order. *Hoots VIII;* Appendix at 883a. The court found:

> that a New School District composed of the present school districts of Churchill, Edgewood, Swissvale, General Braddock, and Turtle Creek would achieve desegregation of the General Braddock Area School District and would achieve the highest beneficial results over and above the results of any other plan submitted to this Court by any party during the whole period of this litigation.

Hoots VIII at 6; Appendix at 889a. The court accordingly ordered

> "[t]he Secretary of the Pennsylvania Department of Public Instruction, or his designate, and the Allegheny County Intermediate Unit [to] meet with the Interim Operating Committee of the New School District on or before the 15th day of June, 1981, to design a plan of desegregation and provide for its implementation with the beginning of the 1981-82 school year, and [to] continue such planning until such plan is fully operational within the New School District."

Hoots VIII at 17; Appendix at 900a.

17. After further hearings, the district court entered two orders on July 23 and August 13, 1981, setting forth the details of a plan of desegregation of the New District. That plan was implemented on September 8, 1981. After more than a decade since the filing of the complaint, a remedy for the violation of plaintiffs' constitutional rights was granted them.[5]

II. DISCUSSION

18. Defendants' present appeal is based on two grounds. First, defendants argue that the district court erred in holding that the defendants had violated the fourteenth amendment because, they argue, the district court found no intentional or purposeful segregation on the part of state officials. Second, defendants argue that the district court erred in fashioning a multidistrict remedy. We disagree.

A. *The Constitutional Violation Finding*

19. Defendants' argument regarding the district court's finding of intentional or purposeful segregation is twofold. First, they contend that the district court in *Hoots II* did not properly state a constitutional violation in terms of a "segregative purpose or intent" standard, as is required by the Supreme Court's decision in *Keyes v. School District No. 1*, 413 U.S. 189, 208 (1973). Second, even if the district court utilized the "purpose or intent" standard, defendants argue that there is no evidence on

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[5] Two related appeals were consolidated with this one by order of this court on August 20, 1981. They are Hoots v. Commonwealth of Pennsylvania, Nos. 81-2298, 81-2787, 81-2788 and Hoots v. Commonwealth of Pennsylvania, No. 81-2732.

the record that would justify a constitutional violation finding.

1. *The Segregative Purpose or Intent Legal Standard*

20. It is not disputed that *Keyes* was the first Supreme Court decision to articulate the requirement of proof of segregative intent or purpose to establish a *prima facie* case of *de jure* school segregation in a northern state without a history of segregation statutes. 413 U.S. at 208. Although *Hoots II* was decided prior to *Keyes*, so that the district court could not possibly have tracked the language of that case, we find that the district court in *Hoots II* satisfied the requirement of proof of intentional or purposeful segregation.

21. The *Keyes* decision did not simply require proof of intent or purpose; it also held that the requisite intent or purpose can be established by inference, as well as by direct proof. 413 U.S. at 201, 208-09. The *Keyes* doctrines were amplified in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), where the Court explained that proof of segregative intent or purpose may be accomplished in various ways, and to varying degrees, and still satisfy the dictates of *Keyes:*

> [The requirement of] proof of racially discriminatory intent or purpose does *not* require a plaintiff to prove that the challenged action rested *solely* on racially discriminatory purpose. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one.

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such *circumstantial and direct evidence of intent as may be available.* The impact of the official action—whether it "bears more heavily on one race than another," *Washington v. Davis,* [426 U.S. 229,] 242 [(1976)]—may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. . . .

429 U.S. at 265-67 (emphasis added) (citation omitted).

22. Proof of segregative purpose or intent was again discussed in *Columbus Board of Education v. Penick,* 443 U.S. 449 (1979), where the Supreme Court re-explained the meaning of segregative intent in the context of school desegregation cases:

> [T]he District Court correctly noted that *actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose. Those cases do not forbid "the foreseeable effects standard from being utilized as one of the several kinds of proofs from which an inference of segregative intent may be properly drawn."* Adherence to a particular policy or practice, "with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn."

443 U.S. at 464-65 (emphasis added) (citations omitted).

23. Bearing in mind that proof of segregative intent or purpose can be accomplished in a number of ways, we turn to an examination of the record. The first indication that the district court was using an appropriate constitutional standard was in *Hoots I*, in which it denied defendants' motion to dismiss plaintiffs' complaint for failure to state a cause of action. The court explicitly emphasized that plaintiffs' complaint contained allegations that "[i]n preparing and adopting the school reorganization plans defendants *intentionally and knowingly created racially segregated school districts. . . .*" *Hoots I*, 334 F. Supp. at 821-22 (emphasis added). From the very beginning of this lawsuit, then, it has been clear that the district court was couching the issues in terms of intentional segregation. And, in *Hoots II*, after full trial, the district court stated conclusions of law which demonstrate that the court was addressing questions of intent and purpose.[6] For example:

> A violation of the Fourteenth Amendment has occurred when public school authorities have made educational policy decisions which were *based wholly or in part on considerations of the race of students* and which contributed to increasing racial segregation in the public schools.
>
> School authorities may not, consistent with the Fourteenth Amendment, maintain segregated schools

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[6] Indeed, courts looked for intentional segregation in segregation cases well before *Keyes* required them to do so. *See, e.g.*, Sealy v. Department of Public Instruction, 252 F.2d 898, 901 (3d Cir. 1958). *Accord*, Swann v. Charlotte-Mecklenburg Board of Education, 401 U.S. 1, 17-18 (1971), expressly reaffirmed in *Keyes*, 413 U.S. at 208 & n. 16, and cited in *Hoots II*, 359 F. Supp. at 823-24.

> or permit educational choices contributing to the development and growth of segregated schools *because of community sentiment or the wishes of a majority of voters.*

Hoots II, 359 F. Supp. at 822 (emphasis added) (citations omitted). This is the language of intention and purpose.

24. That the district court used the appropriate legal standard (*i.e.*, that the court was looking to segregative purpose or intent) in reaching its violation finding is established beyond cavil when we analyze certain factual conclusions by the district court. Some examples are:

> (1) "Because the *State and County Boards in devising this plan* of organization of administrative units for the central eastern portion of Allegheny County *were influenced by* the desires of the surrounding municipalities to avoid being placed in a school district with Braddock and Rankin because of the high concentration of blacks within these two municipalities, *race was a factor*, at least indirectly, in the formation of the school district composed of Braddock, North Braddock, and Rankin." *Hoots II*, 359 F. Supp. at 821, reaffirmed in *Hoots VI*, 510 F. Supp. at 619 (emphasis added).
>
> (2) "[T]he record contained no evidence showing that the school district boundaries established in the plan of organization of administrative units are rationally related to any legitimate purpose and the court found that those boundaries did not promote any valid state interest." *Hoots VI*, 510 F.

Supp. at 619, reaffirming *Hoots II*, 359 F. Supp. at 821, 822.[7]

(3) The court noted that "the history of the reorganization of school district boundaries in the central eastern portion of Allegheny County pursuant to Acts 561, 299 and 150," revealed that the County Boards had acted over a period of years with the intention of guarding the white communities from Rankin, Braddock and North Braddock. *See Hoots VI*, 510 F. Supp. at 619, reaffirming *Hoots II*, 359 F. Supp. at 811-13, 816-17.

(4) "The natural, foreseeable and actual effect of [the Boards' decisions] was to perpetuate, exacerbate and maximize racial segregation within the public schools of the central eastern portion of Allegheny County." *Hoots II*, 359 F. Supp. at 821, reaffirmed in *Hoots VI*, 510 F. Supp. at 618.

We have on other occasions followed the Supreme Court's reasoning that "proof of, foreseeable consequences is one type of quite relevant evidence of racially discriminatory purpose." *Dayton Board of Education v. Brinkman II*, 443 U.S. 526, 536 n.9 (1979); *C.F. Richardson v. Pennsylvania Department of Health*, 561 F.2d 489, 492 (3d Cir. 1977), *citing Washington v. Davis*, 426 U.S. 229 (1976), and *Arlington Heights, supra.*

25. Finally, after having intent language in *Keyes* and *Milliken* brought to its attention, the district court

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[7] In *Columbus Board of Education, supra*, the Supreme Court stated that "a series of Board actions and practices that cannot reasonably be explained without reference to racial concerns" and that causes "racial separation in the schools" strongly evidences intentional discrimination, 443 U.S. 461-62.

explicitly reaffirmed its violation conclusion based on findings of purposeful official segregation. For example in 1975, after the former districts filed motions to dismiss based on the alleged absence of "deliberate purposeful intent to segregate or invidiously discriminate or create a dual system . . . (as required by *Brown* through *Keyes* and *Milliken*)," the district court reopened the violation issue and permitted the districts to present testimony "by the State Board explaining actions [in the 1960's] that may have appeared to be racially motivated" but assertedly were not. Appendix at 2673a, 2799a. After hearing argument, the district court rejected appellants' contentions, based in part on State Board chairman Paul Christman's admission that Board members "knew they were heading into a segregation problem" in the central eastern area. Appendix at 2737a, 2762a. When counsel for Churchill School District argued that the district court "would have come to a different conclusion [in *Hoots II*] if [it] were making [its] order . . . after *Keyes*," Chief Judge Weber stated: "This is one place where you can say [you are] 100 percent wrong." Appendix at 2739a. The court then reaffirmed its earlier holding that the Board had "purposefully" segregated GBASD. Appendix at 2761a.

26. Furthermore, the court, in its November 11, 1979 Memorandum Order, indicated that the plaintiffs had established: that "segregative intent" had been demonstrated, Appendix at 3201a-3202a; that "racially discriminatory acts of the state have been a substantial cause of interdistrict segregation" *Hoots VI*, 510 F. Supp. at 619; that "district lines have been deliberately drawn on the basis of race," *id.* at 616, *quoting Milliken;* and that

GBASD was "intentional[ly] creat[ed] as a racially identifiable school district," *Hoots VIII* at 9; Appendix at 892a.

27. In short, there is no question that the district court utilized the correct legal standard—intentional or purposeful segregation. Obviously, it could not, in *Hoots II*, have cited the exact language of the forthcoming *Keyes* opinion. That does not mean, however, that *Hoots II* does not comply with the standards enunciated in *Keyes*, and we hold today that *Hoots II* did comply with those standards.

2. *The Factual Evidence of Segregative Purpose or Intent*

28. Having decided that the district court used the correct legal standard, we now turn to the question of whether the court's finding of intentional racial segregation based on the evidence it cited, was clearly erroneous under Fed. R. Civ. P. 52 (a).[8]

29. For an appellate court to find that a trial court's conclusion was clearly erroneous, the reviewing court must be "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). The Supreme Court has also cautioned that adherence to this standard of review is particularly important in a desegregation case because of the trial court's "proximity to local [school]

[8] Rule 52(a) provides, in part: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

conditions." *Brown v. Board of Education II*, 349 U.S. 294, 299 (1955), and because the trial court's "[f]indings as to design, motive and intent . . . depend [so] peculiarly upon the credit given to witnesses by those who see and hear them." *United States v. Yellow Cab Co.*, 338 U.S. 338, 341-42 (1949).

30. The heavy burden on a party attempting to overcome the clearly erroneous standard in a case of this nature was stated recently by Chief Justice Burger, concurring in *Columbus:*

> Like Mr. Justice Rehnquist, I have serious doubts as to how many of the post-1954 actions of the Columbus Board of Education can properly be characterized as segregative in intent and effect. *On this record I might very well have concluded that few of them were. However, like Mr. Justice Stewart, I am, prepared to defer to the trier of fact because I find it difficult to hold that the errors rise to the level of "clearly erroneous" under Rule 52.* The District Court did find facts sufficient to justify the conclusion reached by Mr. Justice Stewart that the school "district was not being operated in a racially neutral manner" and that the Board's actions affected "a meaningful portion" of the school system. *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 208 (1973).

443 at 468 (emphasis added).

31. In the briefs and in oral argument plaintiffs have explicated much of the direct and circumstantial evidence relied upon by the district court in reaching its viola-

tion determination. We will recite some of that evidence here. All of the following examples were cited and relied upon by Chief Judge Weber in *Hoots II*, 359 F. Supp. at 816-17:

(1) There was in evidence a letter to the County Board in 1964 from a Mrs. Ryland, a resident of Turtle Creek, requesting the Board to shield the white children of Turtle Creek from "colored people [of] the kind that live in North Braddock, Braddock and Rankin." Appendix at 300a.

(2) There was in-court testimony by a central eastern area municipal official, Joseph D. Suley, admitting that he and his colleagues had pressured State and County Board members in the 1960's to insulate their municipalities (Braddock Hills, Turtle Creek and East Pittsburgh were mentioned by name) from merger with Braddock and Rankin because of "the black issue" and because of the "bitterness" felt by "whites" towards "blacks" in the area. Appendix at 118a-126a.[9]

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[9] Defendants argue that Mrs. Ryland's letter should not have been admitted and that significant portions of Suley's testimony were hearsay. Our review of the record reveals no timely objections by the defendants, but does disclose that at the end of Suley's testimony, a motion to strike was made. Appendix 149a. The district court reserved ruling on the motion, but ultimately did not grant it.

On appeal, defendants argue that the district court erred in failing to grant the motion to strike, and that the district court was clearly erroneous insofar as it inferred segregative intent from Suley's testimony and Mrs. Ryland's letter. Assuming without deciding that the motion to strike was properly presented to the district court at least with respect to Suley's testimony, we find no merit to the defendants' argument.

(3) There was in evidence a suggestion in a 1965 State Board Staff report that "the non-white population . . . factor" contributed to certain municipalities' "opposition" to proposals to merge all those districts with Braddock and Rankin. After noting Turtle Creek's and East Pittsburgh's objections to merger with Braddock and Rankin, and North Braddock's objections to merger with Turtle Creek, the staff report stated that "the non-white population is *not* a factor in opposition to *Turtle Creek since* the percent of *non-white* is as follows: Braddock 55%, Rankin 51%, Braddock Hills 10%, East Pittsburgh 20%, North Braddock 10%, *Turtle Creek none.*" (Emphasis added.) Appendix at 310a, 699a. The point is clearly that one of the *reasons* that Turtle Creek's inclusion in the merger was not objectionable was because it had no "non-whites." The implication is that a high non-white factor would be a reason against a district's inclusion.

(4) There was an admission under oath by State Board Chairman Dr. Paul Christman that he approved the isolation of Braddock, Rankin and North Braddock from all its neighbors in 1965 despite his recogn[ition] of "a black-white factor there that was improperly dealt with . . ." He noted that the situation could "become even worse than it was at the time . . . in terms of [the] growth of percentage of blacks in those communities . . ." Appendix at 2702a-2703a.

(5) There was in evidence a statement in a 1964 brief by Braddock Hills officials to the County Board which attributed the Board's refusal to merge Churchill with any of its neighbors to political pressure from

Churchill "based on politics, race, color, or creed . . ." Appendix at 588a.

(6) There was in evidence a letter to State and County Board members signed by Thomas A. Harper, a Braddock School Board member, and LaRue W. Frederick, the President of the area NAACP chapter, attributing neighboring municipalities' opposition to merger with Braddock and Rankin to fear of an "influx of a large number of Negro students into heretofore predominantly white units" and of the placement of "Negroes on the School Board [and in] professional and non-professional [staff positions] in the school system." Appendix at 592a-593a.

(7) There was in evidence a statement made by County Board President L. W. Early during hearings in 1968 on North Braddock's appeal that "we are painfully aware of [the fact] that . . . over the years the surrounding school districts had sought to avoid a school merger which would include Braddock and Rankin in their school district and that it looked like Braddock was going to be 'left holding the bag.'" Appendix at 701a.

(8) There was in evidence a statement by a County Board member "call[ing] attention to the fact that the socio-economic factors involved in Turtle Creek—East Pittsburgh make it a homogeneous unit." Appendix at 308a.

(9) Dr. John Finger, plaintiffs' educational expert, testified that, in his professional opinion, it was possible to "infer from some of the [public] documents that . . . race, indeed, was taken into consideration" by public officials "in recreating school districts," and that those officials "exclude[d] Rankin and North [Braddock] and Braddock" from consolidation with neighboring white dis-

tricts "because they are black." Appendix at 230a, 237a-38a.

32. In addition to specific pieces of direct evidence of segregative intent or purpose, we have already noted that the district court properly relied on circumstantial or "objective" evidence in *Hoots II*. *See* pp. 17-19 [100a-102a] *supra*. The district court, for example, considered it significant that the Boards' redistricting plan disregarded statutory and administrative reorganization standards, *e.g.*, the statutory 4000 pupil minimum guideline, the requirement that existing facilities be used where possible, the requirement of racial and cultural diversity, and the requirement that each district be capable of providing a comprehensive educational program. *See Hoots II*, 359 F. Supp. at 819-20.

33. Furthermore, the district court, properly weighed evidence such as the Board members' admitted knowledge that their redistricting decisions would cause and perpetuate segregation, the foreseeability of the segregative result, the Boards' formulation of boundaries that promoted no interest other than racial segregation, the Boards' rejection of alternative school district configurations in favor of a segregation-maximizing alternative, and the State Board's blatantly improper interpretation of its own "race regulation" to endorse the very evil the regulation was designed to prevent.[10] *Hoots II*, 351 F. Supp. at 819-20.

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[10] In carrying out the Reorganizations Acts, the State Board promulgated guidelines including one stating that "[r]ace . . . *shall not be* [*a*] *factor* [ ] in determining administrative boundaries." *See* note 3 *supra*. In drawing the boundary lines in cen-

34. Based upon this evidence, and upon the record as a whole, we find that the district court's constitutional violation finding was not clearly erroneous and, indeed, was fully supported by the record.

B. *The Multidistrict Remedy*

35. Defendants argue that the district court abused its discretion by consolidating the five school districts of Churchill, Edgewood, Swissvale, Turtle Creek, and GBASD into one desegregated district. We disagree.

36. We have noted before that "[i]n litigation as long and complex as this, the fashioning of relief should normally 'be entrusted in large measure to the sound discretion of the District Court Judge who has lived with [it] for so many years.'" *Hoots V*, 639 F.2d at 979, *quoting Gilmore v. City of Montgomery*, 417 U.S. 556, 577 (1977) (Marshall J., concurring). Furthermore, we said that

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tral eastern Allegheny County, State and County Board members admittedly applied a segregation "blind" interpretation of the guideline. That is, they pretended that they could be totally *oblivious* to race as a consideration—even if that meant that there would be greater segregative effects as a result of their actions. They adopted that stand despite their knowledge that such an interpretation conflicted with the State Human Relations Commission regulations and state policy and would result in the perpetuation and aggravation of pre-existing segregation in the central eastern area. *Hoots II*, 359 F. Supp. at 818-19. The district court concluded that the Boards' adoption of this blatantly unacceptable and counter-intuitive interpretation of the "race" guideline provided circumstantial proof that the Boards' otherwise-inexplicable choice of this interpretation was invidiously motivated. We agree.

> [i]t is important to recognize that, as a reviewing court, we are not empowered to consider the matter *de novo*. The approval of a desegregation plan is committed to "the exercise of the district judge's discretion . . . [and] a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right." *Swann v. Board of Education*, 402 U.S. 1, 15-16. . . .

Evans v. Buchanan, 582 F.2d 760 (3d Cir. 1978) (further citations omitted).

37. The controlling standards for examining the propriety of an interdistrict remedy were laid down by the Supreme Court in *Milliken:*

> The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann*, 402 U.S. at 16. Before the boundaries of the separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially *discriminatory acts of the state or* local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus, an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, *or where*

district lines have been deliberately drawn on the basis of race.

418 U.S. at 744-45 (emphasis added).[11]

38. In *Milliken* the Court held that a federal district court should not have ordered fifty-three suburban school districts to participate in the desegregation of the Detroit schools. The Court was concerned that the relief granted in that case was totally disproportionate to the "nature and extent of the constitutional violation." 418 U.S. at 744. Because the district court had received evidence of *de jure* segregated conditions in the Detroit schools, the Court reasoned that "[t]o approve the remedy ordered . . . would impose on the outlying districts, not shown to have committed, any constitutional violation, a wholly impermissible remedy." 418 U.S. at 745.

39. In this case, unlike *Milliken*, the court tailored the relief granted to fit the actual showing of *de jure* discrimination by *all* of the districts involved. Indeed, the

[11] *Milliken* also requires that "a meaningful opportunity for the included neighboring school districts to present evidence or be heard on the propriety of a multidistrict remedy or on the question of constitutional violations by those neighboring districts" be afforded to the school district, 418 U.S. at 712-22 (footnote deleted). Here such a "meaningful opportunity" was afforded at all times. To the extent that the defendant school districts were precluded, after the district court's liability decision in 1973 in *Hoots II*, from arguing the question of whether there was intentional racial discrimination, we adhere to our earlier holding that the school districts' post-1973 intervention motions were untimely, *see Hoots III*, *supra*, 495 F.2d at 1097, and we reject the defendants' argument that the district court's decision should be reversed for failure to join necessary parties under Fed. R. Civ. P. 19.

remedy fashioned by the district court here was narrowly drawn.[12]

40. The district court granted relief after finding that the State and County Boards intentionally created GBASD and its neighbors as identifiably black and white districts, and that this interdistrict violation conducted by the State occurred during the reorganization process in the 1960's and "included the redrawing of school boundaries in that part of [*i.e.*, central eastern] Allegheny County." *Hoots VI*, 510 F. Supp. at 619. Furthermore, the district court quite clearly found the constitutional violation to be "the manner in which the school district lines were drawn," including both the racially motivated refusal of County and State Boards to exercise their "expressly retained . . . power to force further merger" of GBASD's component municipalities with the surrounding white municipalities, and "the very elimination [of GBASD] from consideration for merger with [the predominately white] districts." *Id.* at 620-21.

41. The court thus located and defined the *de jure* constitutional violation. Its explication of that violation was unambiguous. It proceeded to examine explicitly the dictates of *Milliken* and its progeny, and concluded that school districts in central eastern Allegheny County were created as part of the constitutional violation and that "[a] multidistrict remedy can be applied to [those] surrounding districts [whose] boundaries were drawn or redrawn during the course of the same violation which created the segregated school districts." *Id.* at 619.

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[12] We believe it bears repeating that Chief Judge Weber has very ably dealt with all of the intricate, complex, and hotly contested issues in this case since 1971.

42. Thus, it was rational for the court to conclude that an interdistrict remedy was appropriate in this case because it concluded that the violation itself was interdistrict in nature. That such a remedy is totally in harmony with *Milliken* is stressed by Justice Stewart in his concurrence in that case:

> This is not to say, however, that an interdistrict remedy of the sort approved by the Court of Appeals would not be proper, or even necessary, in other factual situations. Were it to be shown, for example, *that state officials had contributed to the separation of the races by drawing or redrawing school district lines,* see *Haney v. County Board of Education of Sevier County,* 429 F.2d 364; cf. *Wright v. Council of the City of Emporia,* 407 U.S. 451; *United States v. Scotland Neck Board of Education,* 407 U.S. 484; by transfer of school units between districts, *United States v. Texas,* 321 F. Supp. 1043, aff'd, 447 F.2d 441; *Turner v. Warren County Board of Education,* 313 F. Supp. 380; or by purposeful, racially discriminatory use of state housing or zoning laws, then a decree calling for transfer of pupils across district lines or for *restructuring of district lines might well be appropriate.*

418 U.S. at 755 (emphasis added). *See also, e.g., Evans v. Buchanan,* 416 F. Supp. 328, 340 (D. Del. 1976), *aff'd,* 555 F.2d 373 (3d Cir. 1977) ("Where the State has contributed to the separation of races by redrawing school lines, necessarily the districts on both sides of the lines are part of the violation itself."); *Penick v. Columbus Bd. of Ed.,* 429 F. Supp. 229, 266 (S.D. Ohio 1977), *aff'd,* 583 F.2d 787 (6th Cir. 1978), *aff'd,* 443 U.S. 449 (1979)

("Actions and omissions by public officials which tend to make black schools blacker necessarily have the reciprocal effect of making white schools whiter.")[12]

43. The district court having found a constitutional violation and having properly determined that an interdistrict remedy was appropriate because the violation was committed in the process of drawing school district lines, we believe that the burden of proof shifted to each defendant school district to establish that that district in particular was not involved in the violation. *See Keyes, supra*, 413 U.S. at 208-10 (burden of proof may be shifted to defendants in proper circumstances for reasons of fairness and policy); *Evans v. Buchanan*, 582 F.2d 750, 764-66 (3d Cir. 1978) (en banc) (where *de jure* segregation is established, and where placing burden on plaintiffs to show precise incremental segregative effect would leave

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[12] The district court also properly held that the State and County Boards violated the constitution in the manner in which the school district lines were drawn and so all surrounding districts can be implicated in a remedy, despite their alleged lack of involvement in the process.

> "Where the State has contributed to the separation of races by redrawing school lines, necessarily the districts on both sides of the lines are part of the violation itself, *and exclusion of the suburban districts cannot be predicated on their own purported innocence when their present lines were drawn or redrawn in the course of a violation.*"

Hoots VI, 510 F. Supp. at 620, *quoting* Evans V. Buchanan III, 416 F. Supp. at 340. In any event, the district court expressly found that "the surrounding districts" were *not* "innocent" of unconstitutional activity, since they "continually sought to avoid being included in a school district with [Braddock and Rankin] due to the high concentration of blacks" in those areas. *Hoots VI*, 510 F. Supp. at 620-21.

them without a remedy, burden shifts to defendants), *cert. denied*, 446 U.S. 923 (1980).

44. We have carefully considered the contentions of each of the defendant school districts that the district court was clearly erroneous in determining that their noninclusion in a district with the GBASD was due to racial considerations. In light of the burden of proof, we are not persuaded that the district court committed error in rejecting the defendants' claims that not race but factors such as "transportation difficulties," the quality of the school districts' curricula, and so on, lay behind the noninclusion of Edgewood, Swissvale, Turtle Creek, and Churchill. *See Keyes, supra*, 413 U.S. at 210 (once burden is shifted to defendants, "it is not enough, of course, that the school authorities rely upon some allegedly logical, racially neutral explanation for their action").[14]

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[14] Churchill argues strenuously that it stands in a different position from any of the other defendants. First, it argues that the school district reorganization in central eastern Allegheny County was finally completed under Act 150, and that Act 150 contained a "grandfather clause" which protected any school district created before the passage of Act 150 from being consolidated against its wishes with another school district. As Churchill was created out of the consolidation of three smaller districts before Act 150 was passed, and as Act 150 was never itself attacked as racially discriminatory, Churchill concludes, the district court had no basis for holding that the failure to include Churchill in a larger district was based even in part on racial considerations. We agree with the district court, however, that "[t]his argument is without merit since the constitutional violation was not only committed under Act 150, but pursuant to the entire reorganization process that began with Act 561." *Hoots VI, supra*, 510 F. Supp. at 621.

45. In its April 28, 1981 opinion, rendered after the April 20-21 hearings, the district court set forth very clearly its reasons for the remedy in question:

> (1) It would produce a district with a school population 83% white and 17% minority (mostly black), within a general range of recognized desegregation guidelines and comparable to the population distribution over a wide area of Allegheny County.
>
> (2) The pattern of desegregation established is likely to remain stable.
>
> (3) All of the districts included are contiguous to each other, three of the districts border General

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Second, Churchill points to a statement by the continued district court in a Memorandum and Order dated November 18, 1977, that "no evidence exists of a deliberate, purposeful, segregative intent in the creation of the Churchill district that would subject it to an interdistrict remedy to achieve racial balance." Appendix 841a. As we read the district court's statement, however, it merely indicates that the formation of Churchill out of Wilkins, Forest Hills, and Chalfant (all of which were white districts) was not racially motivated. That statement, however, is no different from Edgewood's argument that its lack of desire for a merger with another white district—Swissvale—disproves any racial motivation. Both arguments miss the point: whether a school district desires to merge with other white districts (as in the case of the three which merged to form Churchill), or does not (as in the case of Edgewood and Swissvale), says little about whether that district's failure to be included in a still larger district along with GBASD, was due to racial considerations. Thus the district court's 1977 observation in no way undermines the district court's present conclusion that it was not simply under Act 150 but in the entire process of reorganization from Act 561 on that the violation occurred.

Braddock, and the remaining district, Edgewood, borders one and almost borders another.

(4) The area of the New District is moderate in size (13.5 sq. miles) as compared to the average size of Allegheny County Districts (15 sq. miles).

(5) The district is roughly circular in configuration, lending itself to increased administrative and transportation efficiencies.

(6) All points in the district are within 2.5 miles radius of its center, and the greatest diameter from one edge of the district to the other is less than 5 miles.

(7) Student population density of the New District would be 821 per square mile, a high density compared to the 275 per square mile density of the average Allegheny County School District (excluding the City of Pittsburgh).

(8) Student population of the New District would be 9,132 in 1981, which exceeds the minimum of 4,000 students mandated for merged districts under the statutory and regulatory guidelines of the Commonwealth of Pennsylvania.

(9) Student enrollment in all of the merged districts has been declining at a rate exceeding 35% in the past ten years, and from the student population figures in grades from kindergarten to 12th grade may be expected to decline at a comparable rate in the next eight years, all of which indicates a

need for consolidation to achieve educational efficiency and economy.

(10) All of the merged districts have excess capacity, in most cases substantial, at all instructional levels, making the excess capacity for the New District 40%. This will increase as the student population continues to decline. This excess capacity could be greatly reduced by the merging of these districts, the merging of student population, the discontinuance of old buildings requiring extensive repairs, allowing for a better organized comprehensive educational program without additional cost, and the possibility of very substantial savings in costs, as well as achieving desegregation.

(11) The New District will be strongly interconnected by available transportation arteries, and the relatively short distances between most parts of the district will minimize the time and mileage involved in any additional transportation needed.

(12) The existing transportation facilities of the merged districts, should be adequate to serve the transportation needs of the New District.

(13) Inasmuch as a substantial number of public school students in the present district are bussed, and because of the limited distances in the New District, it is not contemplated that any large increase in the total mileage or number of students transported will result from the consolidation.

(14) The proposed New District will be financially viable, having a higher tax base per student

than the state average, and higher than some of the present districts included.

Hoots VIII at 6-8; Appendix at 889a-891a.[15]

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[15] The district court also gave reasons for inclusion of each individual district in the new district:

(1) *General Braddock*: This district must be in any remedy because its intentional creation as a racially identifiable black school district constituted the constitutional violation found in this case. Its 64% black student population in a larger area where the surrounding districts vary from less than 1% to a maximum of 13% black makes it mandatory for inclusion. It has continued serious financial problems that make its future as a viable district uncertain.

(2) *Turtle Creek* is included because it is contiguous to the General Braddock area, and also contiguous to Churchill which is also included in the New District. It is racially identifiable as a white school district (98%), it is small in area (1.37 miles), and has a high density of pupils per square mile (920), it has significant unused building capacity, particularly in its high school, and has experienced dropping enrollment and faces a continuing decline. Its present 1,200 student population in the face of a state standard of 4,000 students required for an adequate educational program renders its future as a viable independent school district cloudy. It has adequate transportational connection with the rest of the New District. It has close community business and occupation ties with the General Braddock Area District and also with the Churchill Area. It faces the same economic problems as the General Braddock district.

(3) *Churchill* is included because it is contiguous to General Braddock, as well as contiguous to Turtle Creek, Swissvale, and almost if not actually contiguous to Edgewood. It is identifiable as a 99.2% white school district. It has excess capacity in its facilities and declining enrollment. Its geographical position puts it in the heart of the New District, and its exclusion from the compact formation of the New

46. In a recent statement of the proper role of an appellate court in reviewing the trial judge's exercise of his discretion, we stated that a judge abuses his discretion "only when the judicial action is arbitrary, fanciful, or unreasonable, or when improper standards, criteria, or

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District would make all of the consideration of geographical contiguity and compactness of the New District meaningless. Its economic strength would add financial stability to the new district.

(4) *Swissvale* is included because it is contiguous to the General Braddock Area District, as well as contiguous to Churchill and Edgewood in the New District, it is small in geographic area but with a high density of pupils per square mile (771), it is small in student population (1,757), below the minimum state standard requiring consolidation, and its student population. It has many connecting arteries of transportation with the rest of the New District. Its exclusion would result in a large vacuum between the other areas of the New District because of its central position in the configuration and its nexus of transportation arteries connecting other parties of the New District.

(5) *Edgewood* is included because it is identifiable as a white school district (98%) in a general area the composition of which is 17% black, and where the adjoining district, Swissvale is 13% black, its very small geographic size, (½ sq. mile), its high student population (731), which has declined and will continue to decline, and its substantial underutilisation of facilities. It is close to many other schools in the New District, and has ready transportation access to the other areas included in the consolidation. We recognize that Edgewood was granted an exemption from the 4,000 minimum student population requirement after much litigation, but its student population has continued to decline. It is highly commendable that this district has been able to attract 100 tuition students from Pittsburgh and other districts to help fill the underutilized facilities, and that it is able to receive $1,000 or $1,-

procedures are used." *Evans v. Buchanan*, 555 F.2d at 378-79, *citing Lindy Bros. Builders, Inc. v. American Radiator and Standard Sanitary Corp.*, 540 F.2d 102, 115-16 (3d Cir. 1976) (en banc). Using this standard of review, we find that the district court did not abuse its

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200 per tuition student in this process, bringing substantial additional revenue to the district. However, it is possible for Edgewood to educate these additional students at a figure much less than the average cost of education per pupil because of the economic law of marginal cost, no increase of operating costs is involved in the utilization of the empty classroom seats. However, in so doing Edgewood has entered the business of private education of its own residents. This is contrary to the Commonwealth's school district reorganization policy. Edgewood's inclusion rounds out the compact shape of the district, and adds financial stability to the new District.

All of these districts are properly subject segregation of the General Braddock Area School District because of their involvement in the violations which led to the creation of the General Braddock Area School District as set forth in our Opinion of March 5, 1981.

Appendix at 892a-895a.

The 1980-81 percentages of black enrollment in the New School District's constituent parts are helpful in understanding the desegregative purpose and effect of the district court remedy:

School District	1980 1981 Enrollment	Black	% Black
Churchill	3,342	27	.8%
Edgewood	731	16	2.2%
Gen. Braddock	2,042	1,279	62.6%
Swissvale	1,757	223	12.7%
Turtle Creek	1,260	24	1.9%
Total	9,132	1,569	17.2%

Appendix at 3233a.

discretion in fashioning its multidistrict remedy. Indeed, the district court's action fully complied with all applicable standards and was supported by more than enough evidence.

CONCLUSION

47. For the foregoing reasons, the judgments of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit